IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

HOUSEHOLD GOODS CARRIERS' BUREAU, ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From the United States District Court for the Northern District of California

JURISDICTIONAL STATEMENT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Statutes Involved	3
Questions Presented	3
Statement of the Case	4
The Questions Are Substantial	6
Conclusion	17
Appendix A	1a
Appendix B	10a
Appendix C	57a

CITATIONS

CASES:

Akers Motor Lines, Inc. et al v. United States, 286 F.Supp. 213 (W.D.N.C. 1963)	15
American Trucking Associations, Inc. v. United States, 365 U.S. 1 (1960)	3
Freight Forwarders Institute, et al. v. United States, 263 F.Supp. 460 (S.D.N.Y. 1967)	15
Frozen Food Express v. United States, 351 U.S. 40 (1956)	3
Kingpak, Inc., Investigation of Operations, 103 M.C.C. 318 (1967)	2, 7
Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 386 F.2d 607 (3d Cir. 1967)	16
Riss & Co. v. United States, 341 U.S. 907 (1951)	16
Routed Thru-Pac, Inc., Freight Forwarder Application, 332 I.C.C. 352 (1958)	7
United States v. Drum, 368 U.S. 370 (1962)	2

STATUTES: Page

Administrative Procedure Act, 5 U.S.C. §§ 554 and 706

Section 5 ..... 3, 16
Section 10(e) 3

Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.*

Section 207 3
Section 402(a)(5) 3, 13
Section 402(a)(6) 3, 14
Section 402(b) 3
Section 404(d) 3, 8, 9
Section 418 3

National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001 3

Judicial Code, 28 U.S.C. §§ 1 et seq.

Section 1253 2
Section 1336 2
Section 1398 2
Section 2101(b) 2
Section 2284 2
Section 2321 2
Section 2322 2
Section 2323 2
Section 2324 2
Section 2325 2

LEGISLATIVE MATERIAL:

Senate Bill S. 210, 77th Congress, First Session (1941) 7, 8

H.R. 3684, 77th Congress, First Session (1941) 7, 8, 9, 13, 14

H.R. Report No. 1172, 77th Congress, First Session (1941) 13

Committee of Conference Report No. 2006, 77th Congress, Second Session (1942) 14

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JURISDICTIONAL STATEMENT

Appellants, Household Goods Carriers' Bureau, Allied Van Lines, Inc., North American Van Lines, Inc., Bert Hussey, d/b/a Hussey's, A. L. Chipman, d/b/a Goodwin Moving and Storage Co., United California Express and Storage Co., d/b/a U. C. Express and Storage Co., and Von Der Ahe Van Services, Inc., d/b/a

Bentley's Inc., appeal from the judgment of the United States District Court for the Northern District of California entered on June 10, 1968, dismissing a complaint against a report and order of Interstate Commerce Commission, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court has not yet been reported in the Federal Supplement, but copies of the opinion and order as released by the Court are attached hereto as Appendix A. A copy of the decision and order of the Interstate Commerce Commission in Docket No. MC-C-4455, and related cases, *Kingpak, Inc., Investigation of Operations,* dated December 8, 1966, and served January 5, 1967, reported at 103 M.C.C. 318, is attached as Appendix B.

JURISDICTION

This suit was brought under 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325 to enjoin and set aside the decision and order of the Interstate Commerce Commission (Appendix B). The judgment of the United States District Court for the Northern District of California was entered on June 10, 1968, and Notice of Appeal was filed in that Court August 8, 1968. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by §§ 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment of this case on direct appeal: *United States* v. *Drum,* 368 U.S.

370 (1962); *American Trucking Associations* v. *United States*, 364 U.S. 1 (1960); *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

The relevant statutory provisions are the National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001; and the following sections of the Interstate Commerce Act: Section 207 [49 U.S.C. § 307], Sections 402(a)(5) and (6) [49 U.S.C. § 1002(a)(5) and (6)], 402(b), 404(d), and 418 [49 U.S.C. § 1002(b), 1004(d), 1018] and Sections 5 and 10(e) of the Administrative Procedure Act [5 U.S.C. §§ 554 and 706]. They are set forth verbatim in Appendix C attached hereto.

QUESTIONS PRESENTED

1. Has the Court erred in holding that when the single shipment of one freight forwarder is joint-loaded with the single shipment of one or more other freight forwarders for the purpose of tendering the combined shipment for line-haul transportation the statutory requirement for consolidation has been met?

2. Has the Court erred in holding that the requirements of the statutory definition of a freight forwarder are satisfied whenever (1) an actual freight forwarder service is being performed and (2) any portion of the through movement, even if it be before consolidation, takes place within the United States?

3. Has the Court erred in holding that the articulation by the Commission of a set of guidelines was an adequate disposition of the consolidated proceeding consisting of a complaint alleging unlawful operations, a petition seeking a declaratory order respecting the

lawfulness of existing operations, and an investigation on the Commission's own motion into the lawfulness of the operations of specifically named respondents?

4. Has the Court erred in holding that it is premature to review the announced intention of the Commission to hold oral hearings upon forwarder-related applications for motor carrier operating authority if requested by applicants but only upon a showing of good cause if requested by protestants?

STATEMENT OF THE CASE

On May 22, 1961, United Van Lines, Inc., a motor carrier of household goods operating pursuant to the authority and under the regulation of the Interstate Commerce Commission, filed a complaint with the Commission alleging that four claimants to be exempt forwarders of household goods were not in fact forwarders and were operating in violation of law. On May 11, 1964, the Household Goods Carriers' Bureau, an association of motor carriers of household goods, filed with the Commission a petition for a declaratory order resolving the lawfulness of operations by a large number of purported forwarders of household goods. On May 20, 1964, the Commission instituted its own investigation into the lawfulness of the transportation of household goods by 13 "principal respondents" claiming to be exempt forwarders and 28 "secondary respondents" engaged in furthering or assisting in the performance of the operations of the 13 "principal respondents". The three proceedings, i.e., the complaint, the petition, and the investigation, were thereafter consolidated and extensive hearings were held.

By order dated December 8, 1966, the Commission dismissed the complaint, denied the petition, and dis-

continued the investigation, all without making any finding respecting the lawfulness of the operations of any specific respondent or defendant even though in its report accompanying that order, it stated that such a determination was "essential" to a decision in each of the proceedings before it.

In the same report, the Commission announced several interpretations of Part IV of the Interstate Commerce Act which are at variance with the consistent view taken of that portion of the Act over the quarter of a century of its existence. The net result of the Commission's order was to leave undisturbed the operations of a large group of claimants to exemption under the Interstate Commerce Act even though those operations were conducted in competition with the operations of the motor carriers of household goods. Among the novel interpretations by the Commission were the following:

1. The statutory requirement of a consolidation of shipments as a necessary incident of a forwarder's operations can be satisfied by the joint-loading of a single shipment of one forwarder with the single shipment of one or more other forwarders.

2. The statutory requirement of consolidation and break bulk can be satisfied by the performance of those functions at a port of the United States or at a point outside the United States wholly without any necessity for a movement of the consolidated lot within the United States.

In addition to the foregoing, the Commission's report also held that applications of motor carriers for the operating authority necessary to supply the purported forwarders with services in terminal areas would

be granted upon a showing of past operations and without holding oral hearings even though such might be requested by protestants.

Appellants, who were litigants before the Commission, filed a complaint in the United States District Court for the Northern District of California in Civil Action No. 47646 to annul and set aside the report and order. On June 10, 1968, the District Court sustained the Commission's action and dismissed the complaint. (Appendix A).

THE QUESTIONS ARE SUBSTANTIAL

1. The resolution of the issues raised by this appeal could well determine under which mode of transportation a substantial portion of the nation's freight traffic will in the future move. If an entrepreneur is able to achieve freight forwarder status merely by combining a single shipment which he has undertaken to handle for a shipper with the single shipment of another entrepreneur in a similar posture, then the means have been provided to destroy the efficacy of regulation of the physical carriers. The proliferation of such "instant" forwarders and the capture by them of desirable freight may well force the motor carriers into a satellite status *vis-a-vis* the forwarders. The Interstate Commerce Act authorizes the latter to contract with motor carriers at other than tariff rates for most of the physical services for which a forwarder must use a regulated motor carrier. Thus, there would be created a situation in which interposition of a third party would take place between the shipper and the physical carrier to the detriment of the latter and to the detriment of the total transportation service available to the public at large.

Let it not be said that the Interstate Commerce Commission would still have control of the situation through its jurisdiction to grant or withhold freight forwarder operating authorities. The case here is one in which the operations of the third parties are exempt from regulation if, indeed, they satisfy the definition of freight forwarding, but the Commission has already demonstrated its willingness to grant authorization for regulated freight forwarding on the very same basis as has been approved in the *Kingpak* case. (*Routed Thru-Pac, Inc., Freight Forwarder Application,* 332 I.C.C. 352 (1968)).

The Court's acceptance of the phenomenon of joint-loading as a statutorily acceptable substitute for the forwarder function of consolidation is a sharp departure from past Commission practice and is in derogation of the intent of Congress when it defined the forwarding operations to be regulated by the Commission under Part IV of the Interstate Commerce Act. The legislative history of Part IV embraces proceedings before two Congresses—the 76th and the 77th. Insofar as the ultimate definition of freight forwarding and the intent of Congress to identify the transportation thus brought under regulation are concerned, the hearings on H.R. 3684 in the 77th Congress are the most fruitful source . Although the Senate bill S.210 was ultimately passed and became Part IV of the Interstate Commerce Act, this occurred only after substitution of the substantive provisions of H.R. 3684 for the prior wording of S.210.

In its original form, S.210 carried a provision [§ 408 (a)] which prohibited any freight forwarder from contracting with another freight forwarder "for the pooling or division of traffic, or of service, or of gross

or net earnings, or of any portion thereof" without approval of the Interstate Commerce Commission that such pooling "will be in the interest of better service to the public or economy in operation, and will not unduly restrain competition * * *". This entire provision was eliminated in favor of a provision in H.R. 3684 [1] which, taking the form of section 410(i) of that bill then read as follows:

> "Nothing in this part shall be construed to prohibit any freight forwarder from entering into an agreement with another freight forwarder for the joint loading of traffic between points in any transportation subject to this part, where transportation between such points is authorized by the certificate of each such freight forwarder."

Although subsequently the certificate provisions of H.R. 3684 were eliminated, necessitating a revision of section 410(i) as above, the plain import of what is now section 404(d) of the Interstate Commerce Act [49 U.S.C. § 1004(d)] is that joint loading is a permissible practice only after forwarder status has been achieved.

It must here be recognized that in the Commission's decision, sustained by the Court from which this appeal is taken, the Commission held that the provisions of section 404(d) have no relation to the question of whether joint loading may be practiced as a means of effecting the consolidation necessary to qualify as a forwarder in the first instance. By so doing, the Commission has followed the extraordinary reasoning that a practice permissible between regulated forwarders

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[1] Introduced in the House of Representatives some two months after S.210 had been introduced in the Senate.

and subject to the Commission's approval, may be freely indulged in as a means of qualifying for the status of forwarder. The intent of the framers of the legislation was plainly otherwise.

The principal witness of the forwarders who spoke in great detail on all of the various proposals before the Congress was Mr. W. J. H. McEntee who appeared for the Freight Consolidators and Forwarders Institute.[2] In the course of his testimony, Mr. McEntee had occasion to discuss the predecessor of present section 404(d) of the Interstate Commerce Act and he said:[3]

> "I have to explain a slight difference between the proposed sections of H.R. 3684, and parts I, II and III. There is no provision for joint rates as between freight forwarders themselves.
>
> "The bill provides instead, the practical method of cooperation between forwarders, which has continued for some time, and which has produced both a higher degree of service to the public, and an economy in cost, which also make for public interest. Section 410(i) specifically authorizes the practice of forwarders to joint load their traffic between points, when each forwarder, party to the arrangement is authorized by certificate to serve both such points. Thus, by a concentration of the traffic of two or more forwarders, more frequent sailings, with a wider degree of coverage, with an economy in cost and with an economy in the use of equipment, are maintained, to the public's benefit."

It seems clear from the foregoing that in Mr. McEntee's mind the joint loading provision had no rele-

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[2] Hearings on H.R. 3684 before the House Committee on Interstate and Foreign Commerce, 77th Congress, First Session, pp. 57-178, (1941).

[3] *Ibid.*, p. 142.

vance to the definition of a forwarder, but was added to the bill to permit forwarders who had already qualified as such and received their certificates as such to pool their traffic moving in their authorized services (and limited to such already authorized services) in order to achieve maximum efficiency and economy. Certainly if the Institute had intended the bill to encompass in the definitional section this practice which had "continued for some time", it could have easily drafted language for the definition of a forwarder which would have made this clear. Moreover, if that had been the intent, it could logically be contended that there would have been no need for the separate provision of Section 410(i) and, at the very least, if this had been the intent, it is logical to assume that some such statement would have been made in connection with the definitional standards and, particularly, with respect to the grandfather provisions and the requirements for proving public convenience and necessity. No such statement was made. To the contrary, the colloquy between Congressman Reece and Mr. McEntee immediately following Mr. McEntee's statement concerning the joint-loading provision indicates a much different intent:

> Mr. Reece: ". . . I would like to ask you if you feel that the same circumstances would enter into determining convenience and necessity in case of a forwarder as would in the case of some other transportation agency?
>
> Mr. McEntee: "I should think, Mr. Reece, the same determination and the same elements of proof would be required."[4]
>
> * * *
>
> Mr. McEntee: ". . . The success, therefore, of forwarding operations depends entirely upon the

[4] *Ibid.*, p. 143.

ability to concentrate [traffic]. To the degree that that ability is taken away through the diffusion of the same traffic over a number of forwarders, the degree of service suffers accordingly. . . .

Mr. Reece: [The Congressman became concerned that there would be a tendency to end up with the pooling of all forwarder traffic in one "forwarding agency who would have control of the routing of the traffic" under the certificate of public convenience and necessity approach. The Congressman wondered that if this were so maybe Congress should recognize that and deliberately achieve it by appropriate language in this legislation.]

Mr. McEntee: "We have provided, if you recall, the last thing I said on the previous section, the mechanical means under which that could be accomplished in accordance with the provisions of the statute, by making it possible for the freight forwarders to voluntarily enter into agreements with other freight forwarders looking toward the combination of their service movements and their traffic movements for the best service.

"We provide the mechanical means by the provisions of the statute.

"Now the use that will be made of that mechanical means is, of course, voluntarily as between the freight forwarders, but it is equally as certain that the law of supply and demand will force the most acceptable and profitable use of the terms and provisions of that statute."[5]

Again, it is hard to explain this colloquy in any other way than that in Mr. McEntee's opinion joint loading was neither embraced in the definition of a forwarder nor, more particularly, in the authority to be received by the forwarder (as so defined) in its certificate of

[5] *Ibid.*, pp. 144-145.

public convenience and necessity, but, rather, was a practice that required specific, additional authorization. In this context, the "grandfather" clause for granting certificates obviously becomes significant. For if joint loading was intended to be embraced in the definition of a forwarder as satisfying the criteria of consolidation and break-bulk, then one would have expected some discussion of that fact by Mr. McEntee in connection with the "grandfather" provisions and there is none.[6] Moreover, any such interpretation of joint loading would rather obviously have been contrary to Mr. McEntee's antipathy to "the diffusion of the same traffic over a number of forwarders."

2. With respect to the second question raised by this appeal, the Court's holding is also at odds with the legislative history of Part IV of the Interstate Commerce Act. As the Court's opinion shows, the Commission has in the past granted forwarder permits to applicants engaged in foreign commerce where either the assembly and consolidation or the break-bulk and distribution has taken place in a foreign land. In every such instance, however, the counterpart of the considered function has taken place in the United States with the added feature that at least a part of the line haul has also occurred within the United States. The Court in this case, however, has held that the doctrine of satisfying the statutory definition of freight forwarding by operations outside the United States may be stretched to include an operation in which the only physical movement within the United States takes place before consolidation or after break-bulk. The legislative history of the freight forwarder legislation is to the contrary.

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[6] *Ibid.*, pp. 173-174.

H.R. 3684, 77th Congress (1941), carried as section 402(a)(6) the following definition of the term "interstate or foreign commerce" as used in the bill:

> "The term 'interstate or foreign commerce' means transportation (A) between a point in a State and a point in another State, whether or not such transportation takes place wholly within the United States; (B) between points in the same State but through any place outside thereof; or (C) between any point in the United States and any point outside thereof, but only (i) insofar as such transportation takes place from any point in the United States to any other point therein, prior to transshipment at a place within the United States for a movement to a place outside thereof, and (ii) insofar as such transportation takes place from any point in the United States to any other point therein, after transshipment at a point within the United States in a movement from a place outside thereof."

The meaning of the term "interstate commerce" is of paramount importance in this case because the only freight forwarding which is subjected to regulation by the Commission is that which takes place in interstate commerce as defined.[7] It is of great significance, therefore, that the report of the House committee[8] made it plain that the intent of Congress was to leave outside the ambit of the new regulation a forwarding operation in which the performance of the entire line-haul occurs outside the United States. The committee said:

> "Definition of 'Interstate or Foreign Commerce'
>
> "The term 'interstate or foreign commerce' was written with a view to covering the operations of a

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[7] See section 402(a)(5).

[8] H.R. Report No. 1172, 77th Congress, First Session 6 (1941).

> freight forwarder, as defined in section 402(a)(5), insofar as they are carried on between points within the United States, even though the ultimate destination is a point in a foreign country, or the point of origin is in a foreign country. It does not, however, cover that part of a freight forwarder's operation performed beyond the port of embarkation or debarkation."

As above explained, the provisions of H.R. 3684 ultimately were enacted as S.210 after the substitution of them for provisions in the Senate bill. Section 402(a)(6) was modified only slightly by the Committee of Conference which felt impelled to explain the change. The report of the Committee [9] reads in that regard as follows:

> "Section 402(a)(6) of the House amendment defined the term 'interstate or foreign commerce' with a view ot making the new proposed part IV apply to freight forwarding to and from points outside the United States, insofar as it took place within the United States. The definition was subject to problems of interpretation regarding the meaning of the word 'transshipment'. The conferees felt that it was not clear whether the term 'transshipment' meant the giving of a new bill of lading or the unloading and reloading of the property. The definition as agreed to in conference follows the provisions of part I of the Interstate Commerce Act. The term defined is 'interstate commerce' rather than 'interstate or foreign commerce', but the term is so defined as to include foreign operations by freight forwarders insofar as such freight forwarding 'takes place within the

[9] Committee of Conference report No. 2006, 77th Congress, Second Session, 21 (1942).

> United States'. This method of defining the Commission's jurisdiction will, it is believed, work out more satisfactorily than the method proposed in the House amendment."

The foregoing makes it clear that the "freight forwarding" brought under regulation was freight forwarding within the United States, whether in interstate or foreign commerce. It was not the "freight forwarding" conducted by those operators which consolidate their freight at a port of embarkation and perform the break-bulk at a port of debarkation in foreign commerce. Had the Congress meant otherwise, vastly different language would have been used.

3. The third question raised by this appeal is of tremendous importance to the carriers which are regulated by the Interstate Commerce Commission and which look to that agency for enforcement of the Interstate Commerce Act. The holding of the Court below is at war with the holdings of other three-judge courts in other circuits. See *Freight Forwarders Institute et al.* v. *United States,* 263 F.Supp. 460 (S.D.N.Y. 1967), and *Akers Motor Lines, Inc. et al.* v. *United States,* 286 F.Supp. 213 (W.D.N.C. 1968). Both of those cases involved review of orders entered by the Commission discontinuing proceedings initiated on its own motion. In both the Commission failed to dispose of certain material issues of fact and law. In the former of the two cases, the Court found that the Commission's failure was contrary to law and remanded the case to the Commission for a proper disposition. In the latter of the two cases, the Court said:

> "Drained of its procedural verbiage, the Commission's argument is that it is the plaintiff's burden, rather than the Commission's to enforce the trans-

portation laws. We take a higher view of statutory duty and agency function. 49 U.S.C.A. § 304 (a)(6). Cf. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm.*," 386 F.2d 607 (3d Cir. 1967)

To be contrasted with that holding is the holding of the Court below in this cause:

> "The choice of an appropriate remedy in an ICC proceeding is properly entrusted to the expertise and discretion of the Commission."

4. The fourth and final question is one which ought to be resolved to remove what is obviously a misconception on the part of the Interstate Commerce Commission. In *Riss & Co.* v. *United States*, 341 U.S. 987 (1951), the Supreme Court held that applications for motor carrier operating authority, even though not required by statute to be disposed of only after an oral hearing if requested was nonetheless subject to section 5 of the Administrative Procedure Act [now 5 U.S.C. § 554]. The Commission has in the *Kingpak* proceedings given lip service to the *Riss* case by acknowledging that it may not lawfully dispose of an application for motor carrier operating authority without according the applicant a hearing when requested. In virtually the very next breath, the Commission has held that a protestant against the granting of such an application has no equivalent right to an oral hearing. The Court below has held that the announcement of the Commission's intention does not provide a vehicle for court review. The Court ignores the fact that a controversy here exists which ought to be settled on the merits now if for no other reason than to avoid extensive and needless litigation in the future.

CONCLUSION

The questions presented by this appeal are substantial and are of public importance. For the reasons stated, appellants urge that jurisdiction be noted and that the appeal be docketed for plenary review.

Respectfully submitted,

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A. L. CHIPMAN, d/b/a Goodwin Moving and Storage Co.
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APPENDIX A

Opinion of the Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 47,646

HOUSEHOLD GOODS CARRIERS' BUREAU, ALLIED VAN LINES, INC., NORTH AMERICAN VAN LINES, INC., UNITED VAN LINES, INC., BERT HUSSEY, dba HUSSEY'S, A. L. CHIPMAN, dba GOODWIN MOVING and STORAGE, UNITED CALIFORNIA EXPRESS AND STORAGE CO., dba U. C. EXPRESS AND STORAGE CO., and VON DER AHE VAN SERVICES, INC., dba BENTLEY'S, INC., *Plaintiffs*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

OPINION

Before: BROWNING, *Circuit Judge*, and SWEIGERT and BURKE, *District Judges*.

PER CURIAM

This is an action before a statutory three-judge court [28 U.S.C. §§ 1336, 2284, 2321-2325] to annul and set aside a Report and Order of the Interstate Commerce Commission. The Report, *Kingpak, Inc., Investigation of Operations*, 103 M.C.C. 318 (1967), was principally concerned with the legality of door-to-door container services provided by non-regulated freight forwarders of used household goods. In substance, the Commission held that the parties under investigation were performing their services in accord with all the criteria of a freight forwarder as that term is defined in section 402(a)(5) of the Interstate Commerce Act, 49 U.S.C. § 1002(a)(5). The Commission properly deferred to another proceeding consideration of whether these

freight forwarders were relieved of the duty of compliance with part IV of the Act [49 U.S.C. §§ 1001-1022] by reason of the exemption in section 402(b)(2) [49 U.S.C. § 1002 (b)(2)] for freight forwarders who limited their operations to the handling of used household goods.

A freight forwarder is one who in the ordinary course of business assembles and consolidates small shipments into a single lot, assumes responsibility for the transportation of such property from a point of receipt to a point of destination, utilizes the services of carriers by rail, water or motor vehicle to help accomplish the movement, breaks the consolidated shipment up into its component parts, and distributes the goods to their destination point.

Since the original shipments are usually small, the customer is charged on the basis of freight rates applicable to less-than-truckload or less-than-carload shipments. The freight forwarder, who consolidates multiple small shipments into one large one, secures the cheaper transportation rate applicable to full truckload or carload lots. The spread between the two freight rates accounts for his gross profit.

The plaintiffs are all motor carriers of household goods certificated under part II of the Act. The forwarders involved in this proceeding compete with the plaintiffs by offering a service in which household goods are transported from door to door in one container. The goods are stowed into the container at the point of origin, are moved from household to terminal by local warehousemen or motor vehicle operators, are transported overland by rail or truck common carriers and overseas by ocean vessels, are further moved from terminal to household by local warehousemen and motor vehicle operators, and are finally removed from the container at the point of destination. This door-to-door container service eliminates the necessity of rehandling the lading in transit, thus resulting in a more economical rate.

The great preponderance of traffic handled by these freight forwarders consists of the household effects of military personnel moving to and from overseas duty stations. Because of the geographical dispersion of such shipments, the practice of the Department of Defense in tendering shipments to approved forwarders on a rotation basis, and the need for expedited deliveries, the forwarder rarely has sufficient traffic at any one time to permit it to effect consolidation of shipments originating in its own service. Instead a practice has developed whereby two or more freight forwarders secure the economies available in full carload or truckload freight rates by combining their single shipments onto the same truck or car. This combining of shipments is referred to as joint-loading.

Section 402 (a)(5) requires that a freight forwarder assemble and consolidate or provide for the assembly and consolidation of property entrusted to him for transit. The Commission concluded that joint-loading, being the substantial equivalent of consolidation, satisfies the statutory requirement. Such an interpretation by the Interstate Commerce Commission of the very statute which it enforces is entitled to great weight and should not be lightly interfered with by this court in the absence of compelling reasons. See *United States* v. *American Trucking Associations,* 310 U.S. 534, 549 (1940); *ICC* v. *Allen E. Kroblin, Inc.,* 113 F. Supp. 599, 623 (N.D. Iowa, 1953), aff'd, 212 F. 2d 555 (8th Cir. 1954), *cert. denied,* 348 U.S. 836 (1954). No such reasons have here been shown.

The Commission has recognized that consolidation can be performed in many ways. See, *e.g., Hopke Freight Forwarder Application,* 265, I.C.C. 726 (1950); *Barge Service Corp. Freight Forwarder Application,* 285 I.C.C. 249 (1953). It has also accepted the right of two freight forwarders to joint-load their less-than-carload lots onto the same car. *Twin City Shippers Association Freight Forwarder Application,* 260 I.C.C. 307 (1944); *Kelly*

Freight Forwarder Application, 260 I.C.C. 315 (1944); *Empire Freight Co. Freight Forwarder Application,* 265 I.C.C. 109 (1947).

Plaintiffs argue, however, that the combining of traffic in the joint-loading process must always be a combining of consolidated shipments rather than of single shipments; each freight forwarder must effect a consolidation of his own shipments before joint-loading. We disagree. There is nothing in the language of the statute to compel such a result. Furthermore, we see no great distinction between the joint-loading of consolidated and unconsolidated shipments; the service to the consumer is the same in either case. Accordingly, we hold that when the single shipment of one freight forwarder is joint-loaded with the single shipments of one or more other freight forwarders for the purpose of tendering the combined shipment for line-haul transportation, the statutory requirement of consolidation has been met.

Plaintiffs next attack the Commission's finding that such consolidations can be effected through the physical aggregation of shipments at the port of embarkation or even outside the United States. They claim that the mere assembly movement into a port is not enough; at least part of the line-haul movement of the consolidated lot must take place within the United States. However, we find no support for the plaintiffs' position in either the statute or case law.

The Commission has consistently held that the definition of a freight forwarder does not require that all the essential operations be performed within the United States; it is enough that each is in fact performed. To be sure, the Commission's jurisdiction (and hence its power to regulate) extends only to the boundaries of the United States, but because the extent of the operations in the United States is limited does not prevent the entire operation

from being properly classified as freight forwarding. In fact, the Commission has granted permits for the conduct of forwarding operations between the United States and foreign countries [such permits being limited to the extent of the operations within the United States] where each one of the four necessary criteria of freight forwarding as defined in section 402(a)(2) has occurred outside the United States. See, *e.g., Chi-Can Freight Forwarding Limited, Freight Forwarder Application,* 310 I.C.C. 693 (1960) (assembly and consolidation in the United States, break-bulk and distribution in Canada); *Adanac Freight Forwarders Limited Freight Forwarder Application,* 265 I.C.C. 493 (1948) (assembly and consolidation in United States, break-bulk and distribution in Canada); *B. C. Forwarding Co., Freight Forwarder Application,* 265 I.C.C. 308 (1948) (assembly and consolidation in United States, break-bulk and distribution in Canada); *Alltransport Incorporated Freight Forwarder Application,* 325 I.C.C. 183 (1965) (assembly and consolidation in Canada, break-bulk and distribution in United States); *National Carloading Corp. Alaska and Hawaii "Grandfather" Application,* 323 I.C.C. 195 (1964) (assembly, consolidation and break-bulk in United States, distribution by ocean transport).

We hold that the Commission did not err in ruling that the requirements of the statutory definition in section 402 (a)(5) are satisfied whenever 1) an actual freight forwarder service is being performed and 2) any portion of the through movement, even if it be before consolidation, takes place within the United States.

The Order here on review involved three consolidated proceedings heard on a single record: a complaint, a petition for a declaratory order, and an investigation. Each of these was primarily directed to the same issue—the legality of the door-to-door container services provided by the purportedly exempt freight forwarders of used household goods. The Commission's order provided for the dismissal

of the complaint, denial of the petition for declaratory order, and discontinuation of the Commission's self-initiated investigation.

After finding that the described operations met the statutory definition, the Commission was faced with the question of whether the independent forwarders are themselves the persons who perform or provide for the performance of all the functions attributed to them. Although recognizing that it is not improper for a freight forwarder to utilize the services of an agent [see, *e.g., Kelly Freight Forwarder Application,* 260 I.C.C. 315 (1944)], the Commission found that "in some few instances these forwarders are no more than names and that all, or nearly all, forwarding functions are being performed by traffic management companies . . .", [103 M.C.C. at 331] who frequently take complete control of both the consolidation and the routing of the shipments entrusted to them.

Despite the determination that in "extreme cases" at least some of the forwarders were not performing the functions attributed to them, the Commission declined to issue any cease and desist orders. Rather it concluded that "in view of the uncertainty which has attached to the status of forwarders using such agents, it would be appropriate for us to set forth guidelines to assist the forwarders in their future efforts to guard against practices which would cast doubt upon their entitlement to exemption." 103 M.C.C. at 332.

Plaintiffs assert that the Commission's articulation of this set of standards did not satisfy the Commission's obligation to dispose of the issues before it. They claim that the Commission had a duty to determine with specificity and particularity the details of the operations of each respondent before it and to enter cease and desist orders against those found to be operating unlawfully.

The choice of an appropriate remedy in an I.C.C. proceeding is properly entrusted to the expertise and discre-

tion of the Commission. We hold that the articulation by the Commission of this set of guidelines was an adequate disposition of not only the Commission's investigation but of the other two consolidated proceedings as well.

The petition for declaratory order sought to clarify the legal status of the door-to-door container service. Although in form the Commission denied the petition for declaratory order, in substance the relief has been granted by promulgating a set of standards to govern future conduct. Any earlier uncertainty which might have existed was removed by these guidelines.

Similarly, the complaint was properly dismissed, even though it was never determined which, if any, of the respondents were operating unlawfully. Plaintiffs here have pointed to no evidence before the Commission which would support a finding of unlawful operations. At any rate, since cease and desist orders operate prospectively compliance with the new guidelines would render any such orders moot. We find no error in the Commission's decision to defer consideration of the operations of specific freight forwarders until each has had an opportunity to comply with the new guidelines.

In the course of its investigation the Commission became concerned about the activities of the small warehousemen and local cartage companies which handled the terminal services for the exempt or unregulated freight forwarders. This service consists, on outbound shipments, of removing furniture from the homes at the point of origin, taking it to the warehouse for containerizing, and tendering the shipment to a certified motor or rail carrier for transportation to a port for overseas shipment. The inbound service involves the acceptance of packaged shipments of household goods from railroads and certified truck lines, unpackaging them, and placing the goods in the destination residence.

For many years the motor operations of these local operators were conducted without authority in reliance

upon an informal opinion of one of the Commission's Bureaus that such transportation was exempt from regulation. In *Kingpak,* the Commission found that authority is in fact required. As a result, each such local carrier who wishes to continue providing such services will have to file an application for operating authority under section 207 of the Act, 49 U.S.C. § 307. The Commission anticipates that over four hundred such applications will be filed.

With an eye to its ever increasing caseload and to the fantastic burden that the processing of these applications would cause, the Commission announced that in the case of future applications arising as a result of the *Kingpak* decision, a modified procedure will be employed. Each application, insofar as possible will be handled without oral adversary hearings. If the territorial scope of the application is limited to that area in which the applicant has already been performing terminal services for an extended period of time, the applicant can avoid the necessity of further proof by appending to its application verified statements showing its entitlement to the authority sought. Any other interested party may file a protest but "oral hearings will not be held unless in the judgment of the Commission such procedure will assist materially in reaching a prompt and fair decision upon the application." 103 M.C.C. 345.

Plaintiffs contend that such a procedure denies them due process of law. They assert that an existing carrier who opposes the issuance of authority to a prospective competitor has an absolute right to an oral hearing with full opportunity to cross-examine opposing witnesses.

Whatever the merits of plaintiffs' contention, plaintiffs are not in a position at this time to raise it. The Commission did no more than make an announcement of its intention. To date, although over two hundred temporary operating authorities have been issued under 49 U.S.C. § 310a, not one final application has been acted upon.

The modified procedure provides that all interested parties be notified, allowed to protest and submit representations, and be permitted to participate in an oral hearing should one be held. If and when the modified procedure is actually used, plaintiffs may file protests and assert their right to a full oral hearing. Under the policy announced by the Commission, oral hearings are not entirely precluded; such hearings may still be held in the judgment of the Commission. Should the Commission deny plaintiffs' request, plaintiffs will be required to exhaust all the administrative remedies available to them before they can challenge such a ruling in this court. We hold that the challenged procedure may be reviewed only after a final order granting such an application without a full oral hearing and by appeal from such a final order.

The complaint is dismissed.

Dated: June 6, 1968

JAMES R. BROWNING
U. S. Circuit Judge

LLOYD H. BURKE
U. S. District Judge

W. T. SWEIGERT
U. S. District Judge

APPENDIX B

Report and Order of the I.C.C.

INTERSTATE COMMERCE COMMISSION

No. MC-C-4455[1]

KINGPAK, INC., INVESTIGATION OF OPERATIONS

Decided December 8, 1966

1. Provisions of parts II and IV of the Interstate Commerce Act relating to the operations of motor carriers of household goods and freight forwarders of used household goods construed; and the appropriate manner in which these carriers may operate indicated.

2. Carriers providing local pickup, delivery, and transfer services by motor vehicle of used household goods moving on a through interstate bill of lading of a freight forwarder operating under the exemption of section 402(b)(2) of the act found to require appropriate authority.

3. Investigation in No. MC-C-4455 discontinued; complaint in No. FF-C-14 dismissed; and petition in No. FF-C-20 denied.

Harry F. Horak, Mitchell Haller and *Ellis V. Gregory* for the Bureau of Inquiry and Compliance (now the Bureau of Enforcement), Interstate Commerce Commission in No. MC-C-4455.

G. M. Rebman for complainant in No. FF-C-14, and intervener in Nos. MC-C-4455 and FF-C-20.

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[1] This report embraces No. FF-C-14, United Van Lines Inc. v. Container Transport International Inc. Co., and No. FF-C-20, Household Goods Carriers Bureau—Determination of Lawful Services of Non-Regulated Forwarders of Used Household Goods.

Homer S. Carpenter and *John C. Bradley* for petitioner in No. FF-C-20.

Alan F. Wohlstetter and *Frank Loughran* for respondents and defendants in Nos. MC-C-4455 and FF-C-14, and interveners in No. FF-C-20.

David Brodsky, G. Zan Golden, and *Martin A. Weissert* for certain respondents in No. MC-C-4455 and interveners in Nos. FF-C-14 and FF-C-20.

Carll V. Kretsinger and *Herbert Burstein* for respondents in No. MC-C-4455 and interveners in No. FF-C-20.

Edward M. Alfano and *H. Charles Ephraim* for respondents in No. MC-C-4455 and interveners in other proceedings.

E. J. Flavin, Charles M. Walters, Eldon R. Clawson, Lloyd C. Ownsbey, Jr., and *Jackson W. Kendall* for interveners in all proceedings.

David B. Isbell for Pioneer Overseas Service Corporation.

REPORT OF THE COMMISSION ON ORAL ARGUMENT

MURPHY, *Commissioner:*

These three related proceedings include an investigation, a complaint, and a petition for a declaratory order. They were heard together on a consolidated record, and were the subject of a single report and recommended order by the examiner.

No. MC-C-4455 is an investigation instituted on our motion, under the provisions of sections 204(c) and 403(f) of the Interstate Commerce Act and section 2 of the Elkins Act, into and concerning, among other matters, the operations and practices of Kingpak, Inc., formerly known as King Forwarders, Inc., Wichita, Kans., and the other respondents named in appendix A, (principal respondents),

with a view to determining whether they have been and are operating and engaging in practices in violation of sections 410(a), 206(a), 402(a)(5)(c) and 217(b) of the act; and whether those named in appendix B hereto participated in such violations in concert with the principal respondents.

No. FF-C-14 is a complaint (as amended) filed by United Van Lines, Inc. alleging generally that Container Transport International, Inc., Vanpac, and Sea-Van Pak, Inc., are operating as freight forwarders of used household goods under the exemption contained in section 402(b)[2] of the Interstate Commerce Act, when in fact they are not forwarders operating within the requirements of section 402 (a)(5); that rather they are operating as brokers in violation of section 211(a) of said act, and employing carriers which hold no appropriate authority from this Commission as alleged agents for provision of this transportation; and that the operations of the defendants extend beyond the limits of the freight forwarder exemption because they transport commodities other than the used household goods to which the exemption applies.

No. FF-C-20 is a petition filed by the Household Goods Carriers Bureau seeking a declaratory order concerning the legality of the operations being performed in the transportation of household goods in containerized service as conducted by forwarders of household goods operating under the exemption contained in section 402(b)(2) of the act.

Interveners in the three proceedings are Household Goods Forwarders Association of America, Allied Van Lines, Inc., Bekins Van Lines Co., and the National Furniture Warehousemen's Association. The Bureau of Enforcement was made a party to the titled proceeding.

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[2] Section 402(b): The provisions of this part (part IV of the act) shall not apply; (2) where the property with respect to which service is performing consists of * * * used household goods.

In his report and recommended order the examiner in the investigation proceeding set forth findings with regard to the status of the various parties involved as well as the propriety of the manner in which their operations are conducted, and he made recommendations relating to the scope of operations which may be performed by each class of respondent. His other recommendations were that the complaint case be dismissed, and that the petition for a declaratory order be denied. All parties filed exceptions to either all or portions of the examiner's report and recommended order. A number of replies to these exceptions were received, and thereafter the parties were heard in oral argument. Our conclusions differ somewhat from those recommended.

Basic to the problems and issues presented is an understanding of the operations being conducted and the services being rendered by those engaged in furnishing the facilities and transportation under consideration here. However, in view of our conclusions herein, it is unnecessary to identify the operations as those of specific respondents. Such identification may be found in the report of the examiner.

The Background and Scope of the Transportation Operations Generally

The large tonnage and revenue derived each year from the transportation of household goods within the United States, together with the specialized nature of the services required, render such transportation of great significance in the national transportation picture. The bulk of this transportation consists of purely domestic shipments which are generally handled by regulated household goods motor carriers. However, there is likewise a significant number of household goods shipments moving within the United States, some in domestic movement, but most destined to or received from overseas points, which are handled by freight forwarders purportedly operating

under the exemption provided by section 402(b)(2) of the act. It is the service rendered with regard to these latter operations which we are here primarily concerned. While practically all of the domestic and some of the overseas shipments are performed for individuals, corporations, and civilian government agencies, the Department of Defense (DOD) ships such a substantial amount of tonnage from and to so many diverse overseas points that it is, by far, the largest shipper involved in such movements.

There do not generally appear to be practical or legally significant differences between the civilian and the DOD movements, but the evidence of record here relates primarily to the manner in which the DOD shipments are handled, and, therefore, our description and discussion of the operations performed by the various parties will be couched in terms of the DOD controlled movements. In fact, the genesis of these three proceedings may be readily traced to a change that occurred a decade or so ago in the manner in which the DOD began to handle a portion of its household goods traffic.

For many years the DOD relied upon motor carriers of household goods certificated under part II of the act for the bulk of its household goods movements. When these carriers were utilized, the shipments were tendered on a rotation basis to the various carriers approved by the DOD for service at the military installation originating the traffic. The rotation scheme was devised to assure equity of treatment among these carriers. Such movements were generally handled in regular van equipment within the United States and were placed in steel sea-vans for overseas water movements. In some cases, the DOD made its own separate contractual arrangements for the packing, crating, and local movement of such goods with local warehousemen (packing and crating contracts) and for their subsequent line-haul movements by rail or general-commodity motor carriers. However, with the advent of, and

rapid improvement in, containerization allowing household goods to move from door to door in one container without rehandling the lading in transit, and often at a more economical rate, a new service supplied by persons purportedly operating under the exemption of section 402(b)(2) of the act became available which differed from both that offered by certificated household goods motor carriers and that arranged by the DOD with local warehousemen. The DOD then began to approve the utilization of this new forwarder service to handle household goods by the containerized method and tendered shipments within the framework of the rotation scheme that had been employing in its tenders to the regulated motor carriers.

Subsequently, a number of the certificated motor carriers, who generally preferred to utilize their regular household goods van type equipment in conjunction with sea vans, began, for competitive reasons, to establish subsidiaries or divisions prepared to render a through container service in the same manner as the forwarders. These companies were also approved for service and for tenders by rotation within that mode at various DOD installations.

Both the forwarders controlled by motor carriers and the independent forwarders generally operate in substantially the same manner. Thus, they initially obtain a letter of approval from the DOD and then file this letter with the transportation officer at a particular military base together with a letter of intent, and, after approval of the facilities of their designated local agent, they are listed on the roster of carriers authorized to serve that base's needs on a rotation basis. Shipments are then tendered to their local agents, who are generally warehousemen or local movers and who may or may not hold any authority from this Commission. The same agent may represent more than one independent forwarder or affiliate of a motor carrier. An agent will containerize the household goods either at the point of pickup or at its warehouse, depend-

ing upon the weather conditions prevailing, but, in any event, the goods generally move through its warehouse for weighing, banding and stenciling. It then tenders the shipment to a general-commodity line-haul motor or rail carrier for transportation to a port. If the point of origin is located near the port of embarkation, the agent usually will undertake the entire domestic portion of the movement itself. The transportation rendered by both the local agent and the general-commodity carrier is generally performed with flat-bed equipment, although van equipment with flat bottoms is used by the former on occasion, particularly during inclement weather and with smaller containers. When the line-haul movement is to be performed by a general-commodity motor carrier, the shipment may be picked up at the agent's warehouse, while in the case of a rail movement, the agent generally transports the shipment to a rail head. The transportation required for a pickup or delivery may take place within the commercial zone of some point, or it may extend as far as 70 miles. Less than half of these local agents hold appropriate authority from this Commission, but their motor operations have been conducted on the basis of a prior informal opinion of one of our Bureaus which indicated that local motor transportation performed in conjunction with "packing and crating" operations was exempt from regulation under part II of the act because it was a minor incident to the principal undertaking which was the actual packing and crating of household goods.

The charges assessed by the local agent cover both the packing or unpacking services performed and the necessary local transportation, the former accounting for approximately 80 percent of the total amount. In most cases, even if an agent has an appropriate tariff on file, the charges are negotiated.

Most military bases do not tender a sufficient amount of traffic to one forwarder or authorized motor carrier at any

one time to allow that forwarder or carrier to consolidate the shipments tendered to it with others it is handling from the same origin. The local agent may, however, be able to effect consolidations with the shipments of other forwarders at its warehouse, particularly if it represents more than one forwarder, and many shipments ultimately are consolidated into carload or truckload lots by combining them with the shipments of the originating forwarder or other forwarders either at the origin of the line-haul movement or en route to ports. This combining is frequently accomplished by providing for rail car stopoffs for loading. The line-haul rail movements and the combining of shipments[3] are frequently arranged by "service" or "traffic management" companies operating under various descriptive titles. These organizations often act as agents for a large number of forwarders or authorized motor carriers thereby facilitating their ability to arrange consolidations of the shipments. They are frequently owned and controlled jointly by a number of those that they serve. While the functions performed by them vary in particular instances, they generally control the routing and consolidation of the shipments entrusted to them. Their arrangements with the carriers may also provide for advances, customs, ocean transportation, tracing of shipments, and various other incidents to the through movement of the goods from origin to destination. For the services performed they receive as much as 98 percent of the total transportation costs in those cases where they arrange for all of the physical services required.

No question as to the necessity for authority on the part of either the forwarders or the local agents was raised until several years ago. At that time, in response to a query propounded by the DOD, the operations of those engaged in packing, unpacking, and transporting containers

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[3] The combining of shipments of two or more forwarders in the same car, truck, vessel, or airplane is referred to as joint-loading.

locally were reviewed. As a result of this review our Bureau then took the position that the packing and crating of separate pieces of furniture as had been the practice prior to the advent of containers differed substantially from the service offered and performed with regard to containers, and that while local transportation connected with the former might have been considered to be only an inconsequential incident to the prime undertaking of packing and crating and thus not subject to regulation, the transportation performed in connection with the latter was a more significant part of the whole undertaking and requisite motor carrier authority was necessary. The DOD then issued a directive which (1) precludes the tender of its domestic traffic to forwarders operating under the section 402(b)(2) exemption, and (2) requires that forwarders handling its overseas traffic in containers must, in their local operations, utilize only motor carriers that hold authority appropriate for the transportation performed in connection with the movement of these containers.

This more recent informal opinion of our Bureau and the DOD directive that followed it have had a pronounced effect on both the regulated and unregulated household goods moving industry, and, insofar as they affect the above described operations, have given rise to the questions with which we are here faced concerning the interstate transportation of containerized household goods. Basic to these proceedings, and what may be set forth as the general scope of our inquiry, is the lawfulness of the described transportation by the following persons:

(1) independent forwarders of used household goods that purportedly provide service under the exemption of section 402(b)(2) of the Interstate Commerce Act.

(2) motor common carriers of household goods that possess authority under part II of the act, but which also concurrently provide (through an affiliate or

otherwise) a service similar to that provided by forwarders referred to in (1) above.

(3) consolidators, service companies, port agents, traffic management companies and others serving those named in (1) and (2) above by arranging for consolidation, transportation, distribution of shipments, and related services.

(4) warehousemen and local carriers that serve those named in (1) and (2) above by providing packing, unpacking, pickup and delivery services at the origin or destination of shipments.

Discussion and Conclusions

Essential to a decision in each of these proceedings is a determination as to whether or not any of the persons above identified are conducting an operation that meets the definition of a freight forwarder as that term is defined in section 402(a)(5) of the act in performing the described service. That section reads:

> The term "freight forwarder" means any person which (otherwise than as a carrier subject to part I, II, or III of this act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this act.

A freight forwarder may then be described as one who specializes in the transportation of less-than-carload and less-than-truckload freight and who undertakes to see to it that freight is carried from a point of origin to a point of destination. It utilizes the services of carriers by rail, water, or motor vehicle, separately or in combination, in order to accomplish the movement economically and expeditiously. The general nature of this distinctive type of transportation service was recognized even before the operations of freight forwarders were subjected to regulation. Compare *Bank of Kentucky* v. *Adams Express Company,* 93 U.S. 174, *Acme Fast Freight, Inc., Common Carrier Application,* 8 M.C.C. 211, affirmed 309 U.S. 638. While those described as freight forwarders have operated for many years, this term has sometimes been used in the past in a rather broad and somewhat imprecise manner to describe many types of operations including, *inter alia,* those of consolidators, the shippers' agents, and brokers. However, the Congress specifically defined the scope of operations of a freight forwarder so as to clearly distinguish it from those offering other types of transportation services.

A freight forwarder then offers a distinctive and defined service which differs from that offered by other instrumentalities and carriers. See, e.g., H. Rept. 1172 (77th Cong. 1st Sess.). Here, as in other proceedings which revolve principally around whether or not the operations of a particular party are those of a freight forwarder, the nomenclature chosen to denominate the party conducting the operations under scrutiny is not the determining factor. Rather, the conformity of its operations with the criteria enunciated in section 402(a)(5) is determinative of the question as to whether or not it is, in fact, a freight forwarder. Thus, for example, motor carriers subject to part II of the act cannot at the same time act as both carriers and brokers within the scope of their motor carrier authority. Cf. *Practices of Property Brokers,* 53 M.C.C. 633. Nor can regulated freight forwarders act as brokers in a

similar situation. Cf. *Brinke Freight Forwarder Application,* 326 I.C.C. 322.

Of course, it is possible for one whose operations are those of a freight forwarder to also engaged in collateral transportation activities of a different type. However, operations other than those of a freight forwarder can not be predicated upon the same limited essentials that constitute one a freight forwarder within the meaning of the statutory definition thereof. To do so would not only render the terminology employed to describe those performing various operations meaningless, it would also render the statutory definitions contained in the act nugatory.

It is thus apparent here, that if the subject persons are found to meet the section 402(a)(5) definition, to the extent that they are engaged in the activities under scrutiny in these proceedings, they may not, on the same set of facts, also be found to be operating in any other capacity, whether or not the scope of their activities may be such as to also bring them within the 402(b)(2) exemption from economic regulation.

It likewise follows that if they are found to be freight forwarders, within the statutory definition, that the extent of their ownership or nonownership of substantial facilities as well as the amount of their investment is not a consideration of controlling importance. See e.g., *Lifschultz Fast Freight Extension—West and Midwest,* 265 I.C.C. 431.

For convenience of discussion we will consider the operations of the independent forwarders separately from those of van lines operating under part II authority which also engage, either in their own name or through affiliates, in operations comparable to those of the independent forwarders.

THE INDEPENDENT FORWARDERS

Although the authorized motor carriers and the Bureau take somewhat different positions, they collectively maintain that these forwarders do not meet the requirement of section 402(a)(5) of the act which specifies that they consolidate and break-bulk or provide therefor. In support of this basic contention, they argue (1) that combining shipments of more than one forwarder by joint loading does not constitute consolidation, (2) that such joint loading is a privilege made available by section 404(d) only to forwarders holding a permit under part IV of the act, (3) that the consolidation required by the definition cannot occur aboard ship or outside the Commission's jurisdiction without line-haul transportation of the "consolidated shipments" within the United States, (4) that if any actual consolidation does take place it is performed by "service companies," not the forwarders, and (5) that the restrictions recommended by the examiner relating to the manner in which agents and forwarders perform their particular functions recognizes the past illegality of such operations. The independent forwarders take issue with these contentions and argue that they presently perform a legitimate freight forwarder service and meet all of the requirements therefor.

As indicated above, the ultimate question presented is whether these forwarders are, in fact, forwarders as that term is defined in section 402(a)(5) of the act. As a corollary, a question is also raised as to whether the independent forwarders themselves are performing the required services or whether such services are actually being performed for them by others. This latter facet of the proceedings will be discussed later, and it will be assumed, *arguendo,* at this point that these forwarders are those performing the services being discussed.

We note that no question is raised as to the compliance of any exempt forwarder with any of the requirements of

section 402(a)(5) with the exception of the requirement that it consolidate and break-bulk or provide for the same in the ordinary and usual course of its undertaking. The issue raised with regard to this requirement revolves around two questions. First, whether the joint loading practice presently utilized constitutes a true consolidation by each forwarder taking part, and second, if there is consolidation, whether it is performed in the ordinary and usual course of the forwarder's undertaking and in the proper place.

With respect to the joint loading practice, although there are occasions where the forwarder is tendered sufficient traffic to effect consolidation of several of its own shipments, the geographical and chronological dispersion of shipments, the rotation system employed by the DOD, the prime shipper, and the requirement for expedited movement of household goods precludes consolidation of shipments originated by one forwarder in a high proportion of the traffic handled. The forwarder is thus frequently required to joint load with others in order to enjoy the economies available in volume shipments.

The Bureau and the regulated motor carriers correctly point out that section 404(d) of the act specifically allows forwarders performing transportation subject to our economic regulation to joint load subject to our approval of agreements. This conclusion is supported by numerous proceedings cited including, *Kelly Freight Forwarder Application,* 260 I.C.C. 315. They argue, however, that joint loading by freight forwarders is restricted to those subject to regulation. We cannot agree with this reasoning. Section 404(d) does not preclude those forwarders not subject to the act from joint loading, it merely constitutes a partial exemption from the specific requirement of section 418 that regulated forwarders utilize only certain types of carriers, not including forwarders, for the performance of their services. Therefore, we do not con-

sider decisions based upon the substantive sections of the act, including 404(d) and 418, which relate only to regulated forwarders, to be controlling here. On the other hand, section 402(b)(2) specifically exempts forwarders of used household goods from "the provisions of this part (part IV of the act)" not just the service subject to the part. There is no appropriate reason, therefore, to discuss the joint loading operations of these forwarders in the context of substantive provisions of an act from which they are specifically and totally exempted, any more than to discuss the applicability of the rates and other practices governed by the first three paragraphs of section 404.

However, we do think that joint-loading requires a participation by all involved. Whether the manner in which an independent forwarder engages in this practice constitutes such participation will be discussed hereafter in the context of its relationship to those noncarriers serving it and the manner in which it conducts the remainder of its operations.

The record makes it clear that these forwarders, whether or not they joint load, do frequently start a rail car with one shipment and utilize stops en route in order to consolidate carload shipments. This practice is challenged as not constituting a true consolidation because the combining of the shipments does not take place at one time and place and prior to the line-haul movement. However, there is no specific requirement in the act that consolidation take place at one place, and the arrangements made provide for carloads, albeit through loading en route, and thus ultimately comprehend line-haul movements of carload shipments. The period during which shipments move prior to this combining can be considered to be no more than a type of assembly operation and, therefore, not a disqualifying act. All of the arrangements necessary for the through transportation in the United States, including the local transportation necessary could not, of course, be turned over to the railroads. Compare *Kagarise Freight Forwarder*

Application, 260 I.C.C. 745. However, there is no evidence that a practice of this nature is conducted or contemplated.

Further, we have recognized that consolidation may be performed in various ways, all of which reflect what is considered in the particular circumstances to be the most efficient and economical method of performing this function. Compare *Barge Service Corp. Freight Forwarder Application;* 285 I.C.C. 249, *Hopke Freight Forwarder Application,* 265 I.C.C. 726; *Forwarder Volume Commodity Rates, Chicago and New York,* 310 I.C.C. 199, affirmed *Eastern Exp., Inc.* v. *United States,* 198 F. Supp. 256, 369 U.S. 37. We have likewise approved certain rules and practices of the railroad relating to such matters as marriages, and stop-offs, which can be utilized by any party meeting the requirements therefor. The existence of certain of these practices was known at the time part IV of the act was enacted. (See, e.g., Hearing on S. Res. 146, Committee on Interstate Commerce, 76th Cong., 3d Sess. 1940). In these circumstances, there is no reason to find that the forwarders of household goods cannot likewise utilize them when appropriate and advantageous. We therefore conclude that, if properly effected, joint loading by independent forwarders of used household goods constitutes the assembly and consolidation required of a forwarder by section 402(a)(5) of the act.

When this manner of effecting carload and truckload quantity movements is considered to constitute consolidation, the frequency of these consolidations establishes that they are clearly being performed "in the ordinary and usual course of the forwarder's undertaking." It is not necessary, of course, that every shipment handled by a freight forwarder be consolidated in order to meet this quoted standard. Compare *Dinion Coil Co.* v. *International Forwarding Co.,* 304 I.C.C. 1. The proceedings cited by those holding a contrary view relate to situations in which the considered service held out and performed was clearly

not that of a freight forwarder and the Commission so found.

Further, we see no reason why consolidations effected at ports or outside the country should not be considered as consolidations for the purpose of meeting the criteria of section 402(a)(5). While it is true that our jurisdiction extends only to the boundaries of the United States, the operations of freight forwarders, insofar as they conduct operations within the United States, fall within the scope of the act, either as subject to regulation or as exempt because of the nature of the commodities handled. And, although the extent to which their operations may be subject to our review is dependent upon the extent of these operations within the United States, the question as to whether those so acting are freight forwarders is dependent on the characteristics of their entire operation. Compare, *B. C. Forwarding Co., Freight Forwarder Operation,* 265 I.C.C. 308. Moreover, the definition of a freight forwarder does not require that the operations described as essential for forwarder status be performed within the United States, only that they be performed.

Section 402(a)(6), as pertinent, defines the "interstate commerce" encompassed by part IV of the act as "transportation * * * (C) from or to any point in the United States to or from any point outside thereof, but only insofar as such transportation takes place within the United States." And the "service subject to this part" which is regulated is defined in section 402(a)(7) as "all of the service in connection with the transportation in interstate commerce which any person undertakes to perform or provide as a freight forwarder. * * * Thus, it is evident that the initiation of a movement within the United States by one qualifying as a freight forwarder and assuming the concomitant responsibilities, is subject to regulation unless otherwise exempted. This, of course, does not relate to those customs agents and others engaged in importing and

exporting who act in the capacity of agents for their clients within the United States, regardless of the relationship they may assume for these clients in foreign transportation. Nor does it apply to foreign freight forwarders whose service is commenced and terminated in port areas. Compare *Carloader Corp. Freight Forwarder Application,* 260 I.C.C. 282, and *Judson—Sheldon Corp. Application,* 260 I.C.C. 473.

In the area of regulated forwarding we have consistently granted permits for the conduct of forwarding operations between the United States and foreign countries, insofar as such operations take place within the United States, when the evidence indicated that all of the operations necessary to constitute the applicants freight forwarders were not, in fact, to be accomplished within the United States. Compare *Alltransport Inc. Freight Forwarder Application,* 325 I.C.C. 183, and *Adanac Freight Forwarders F. F. Application,* 265 I.C.C. 493.

It is necessary, only that an actual freight forwarder service be performed by a carrier and that a portion of the through movement take place within the United States in order for that carrier to be considered to be operating as a forwarder within this country.

We, therefore, conclude that consolidations are effected by exempt forwarders in the ordinary and usual course of their undertakings when joint loading is properly effected.

As indicated it has been assumed *arguendo* up to this point that the independent forwarders are the persons that are either perfoming or providing for the performance of all of the functions attributed to them. While we see no impropriety in their utilizing agents for the performance of certain functions, the record makes it abundantly clear that in some few instances these forwarders are no more than names and that all, or nearly all, forwarding functions are being performed by traffic management com-

panies or other similar organizations. In such cases, the forwarder whose name is used has little, if anything, to do with the transportation performed or the arrangements therefor. The record then raises the specter of these service companies trying to arrange for local cartage agents for the forwarders "in their stable" with such forwarders receiving as little as two percent of the revenue derived from shipments. At oral argument the parties generally recognized the existence of such conditions and took the position that such control by the service company at the very least renders it questionable as to who is actually performing the transportation, the forwarder or the service company. While it appears, that the cited instances are extreme cases and that some forwarders either do not utilize such service companies at all or do so only on a limited number of their shipments, we think that in view of the uncertainty which has attached to the status of forwarders using such agents, it would be appropriate for us to set forth guidelines to assist the forwarders in their future efforts to guard against practices which would cast doubt upon their entitlement to exemption.

We are of the opinion that the following criteria should guide the forwarders claiming exemption under section 402(b)(2) in their relations with those noncarriers who may render various services to them as their agents. It should be recognized that these criteria merely list some of the hallmarks of an exempt forwarder. They are not regulations. Each situation must be judged on its own particular facts. In the typical exempt operation, however, we observe the following characteristics in the forwarder's relations with its agents:

1. There are written agreements between the forwarder and any agent rendering a service to it which reflect the precise scope of the authority delegated and the exact service to be rendered.

2. The forwarder retains complete and total responsibility to the shipper, including that for the tracing of shipments when necessary.

3. The forwarder is aware, at all times, not only of the general method in which its traffic is handled by its agent but also, as soon as feasible, it is informed of the specific underlying carriers utilized in any particular movement.

4. The agent is limited to making arrangements for consolidations and line-haul movements for its principal, the exempt forwarder. All arrangements for local agents are made by the forwarder itself.

5. All solicitations and tenders made by the forwarder are originated and accomplished by it rather than its agents.

6. The agent's charges for its services is based on the actual services performed and the tonnage involved rather than on a percentage of the total revenue to be received by the forwarder. The same is true of the allocation of overhead made by the agent jointly controlled by those it serves.

7. Specific billings clearly indicating the exact services performed by the agents are submitted to the forwarder for direct payment by it.

8. When consolidations are effected by the joint loading of the shipments of several forwarders, the primary or initiating forwarder taking part in a particular consolidation is designated on the underlying carrier's bill of lading as consignor and consignee and the agent clearly designated as such.

9. All forwarders who are parties to a joint loading venture are notified, as soon as possible after the commencement of the line-haul movement, of the names of the other participating forwarders and the relative

liability of the individual forwarder for the cost of the movement.

10. Charges for a particular consolidated carload movement effective by joint loading are shared proportionately by those forwarders involved, with the agent receiving only a service charge.

OBSERVATION CONCERNING LIMITATION ON COMMODITIES

In order to operate within the exemption, a household goods forwarder must limit its operations to the handling of used household goods. While the question as to what is included within this classification is not free from difficulty, the record here is inadequate to make any definite determination. In any event, the bulk of the commodities transported are classified as household goods by the DOD and are transported for servicemen and their families who are moving their residences. At least one party here argues that the investigation and complaint proceedings are sufficiently broad in scope to warrant an examination of this facet of the operations of household goods forwarders, but the main thrust of the field investigation conducted by the Bureau as well as the questions presented in the declaratory order proceeding did not encompass this problem and, rather than reopen the proceedings for further hearing in order to broaden the record so that the issue can be adequately considered, we will defer consideration of this question for another proceeding in which appropriate evidence as to the exact commodities generally handled by these forwarders is of record.

CONTAINER OPERATIONS OF REGULATED MOTOR CARRIERS

The authorized motor carriers take the position that the container service offered under their existing motor carrier authority is not that of a forwarder of household goods. They argue that they may properly lease vehicles of their agents to perform movements as well as utilize sub-

stituted service, including that of rail carriers, for line haul movements performed within the geographical scope of their authority. They admit that in some instances their use of substituted service does not comply with the established requirement that the utilization of such service be made known by tariff publication; but assert that these shipments were handled solely for the Government under section 22 rates and that the latter's agents were aware of the manner in which the substituted service was utilized. It is asserted that the examiner erroneously relied upon cases in which grandfather authority, sought on the basis of substituted service, was denied in reaching his conclusion as to the status of the operations of the motor carriers operating under part II.

The independent forwarders assert that while they may appropriately utilize general commodity carriers for the transportation of household goods in containers, that the transportation of such containerized shipments is different than the specialized type of service contemplated under the motor carriers' certificates, and that such service cannot properly be performed under such certificates.

It is apparent that the independent forwarders and the motor carriers are rendering substantially the same type of service in the same manner to the prime shipper involved here, the DOD. We have found this service to be a bona fide freight forwarding service, albeit specifically exempted from regulation under part IV of the act if performed as above discussed. It is then apparent, as we have noted previously, that such a service cannot constitute forwarding when performed by one party and motor carrier operations when rendered by another.

However, the operations of these motor carriers conducted in the transportation of containerized household goods differ materially from their operations conducted solely through the use of van equipment within the United States. In the former operations the carriers assume re-

sponsibility beyond the limits of their motor carrier certificates, they utilize service companies to perform consolidations and they make extensive use of "substituted" service. Moreover, in those instances where regular agents are used in connection with containerized movements, it has not been established whether or not standard motor carrier leasing agreements are utilized nor whether the compensation paid to these agents is a division of the applicable tariff rate, including packing charges, or solely a negotiated single factor rate.

While some smaller containers may move in van equipment, particularly in inclement weather; the equipment most suitable and that which is generally employed in containerized movements is of the flat-bed type. When regulated carriers use van equipment, the goods are normally repacked into containers at a local warehouse. The material handling equipment necessary to handle large containers differs from that generally utilized for ordinary household goods movements. It is thus apparent that while technological advances in domestic household goods motor carrier service have caused that service to gravitate towards cushioned high-cube equipment, advances in containerization have come from the utilization of flat-bed equipment, forklifts, and improved standardized containers. There also appears to be certain differences in the type of packing utilized, and while it is evidently not true in all cases, containerized shipments are generally loaded to a higher density than ordinary shipments, because ocean carriers' charges are primarily related to volume rather than weight.

There is one difference between the container operations of the authorized motor carriers and the independent forwarders. The motor carriers move DOD traffic under rates filed pursuant to section 22 of the act whereas the independent forwarders are not required to file rates. In the case of nongovernment traffic, however, the affiliates of some of

the authorized motor carriers handle container traffic without filing rates in the same manner as do the independent forwarders. In view of the fact that rates are not subject to regulation in either case and the motor carriers' affiliates are operating in the same manner as other forwarders, this difference is, in most instances clearly a matter of form rather than substance. In these circumstances we conclude that insofar as the authorized motor carriers render the containerized services under consideration in these proceedings, they are, in fact, operating as forwarders, and our previously stated conclusions with regard to forwarding operations apply equally in all respects to them.

As indicated, we see no reason why regulated motor carriers may not function in the capacity of forwarders under the section 402(b)(2) exemption so long as they make this known to the public and conduct their exempt operations in such a manner as to not affect the service rendered under their outstanding certificates. Thus, while they argue that they may use substituted service in performing operations under their motor carrier certificates, the manner in which they are operating in the handling of containerized shipments, particularly insofar as attention to agency and tariff requirements, does not appear to constitute a true substituted service and accordingly this argument will not be further considered. However, we feel that, as a minimum, the following practices must be observed in order to eliminate the possibility of undue or unreasonable preferences or advantages and to assure the public of an adequate service when regulated and unregulated operations are rendered by the same carrier.

1. Forwarding operations must be conducted separately from motor carrier operations, and in line with the provisions prescribed above.

2. Where the same person offers common carrier services both as a motor carrier and as a freight forwarder, they must be equally available to the public.

3. If both motor carrier and forwarding services are offered to the public, the distinction between them must be made apparent in advertising and the documentation issued.

4. If both motor carrier and forwarding services are offered to the public, the shipper shall have the right to select the mode and its selection shall be binding on the carrier.

5. Separate accounting systems must be maintained for the motor carrier operations and the freight forwarding operations.

6. The freight forwarding operations must be limited to the handling of used household goods.

7. Any motor carrier services performed by a certificated motor carrier for its forwarder affiliate shall be compensated for under the rules and rates set forth in the motor carrier's published tariff.

8. Motor carriers shall not refuse to handle shipments of a competing forwarder.

Local Motor Carriers

Warehousemen and motor vehicle operators presently provide household goods forwarders with local motor carrier transportation in addition to packing and unpacking service. This transportation may consist of shipments moved from a household to a warehouse, from a household or warehouse to the terminal of a line-haul carrier, or from or to a port of embarkation. And, although it generally takes place within a relatively short distance of an origin or destination point, often wholly within the commercial zone of such point, it may also encompass a move of many miles. Some of those performing this service do not hold appropriate authority from this Commission, while others holding certificates do not perform the transportation services in compliance with tariffs they may have on file. These

operations thus raise several questions which are of immediate concern in this proceeding.

First, does a motor vehicle operator performing service for a household goods forwarder need appropriate interstate authority to render such motor service from a named point to a place beyond the commercial zone of the named point? And, second, does such a person require authority to operate within the commercial zone of a point?

The regulated motor carriers and the Bureau agree with the examiner that motor vehicle operations conducted for household goods forwarders that involve transportation outside of a point's commercial zone require appropriate authority, but they take issue with his conclusion that carriers serving forwarders are entitled to operate within the commercial zone exemption of section 203(b)(8) of the act, citing the contrary conclusions reached by the Commission in *Bleich Common Carrier Application,* 27 M.C.C. 9. They argue that neither the section 202(c)(2) terminal area exemption nor that contained in section 203(b)(8) relating to commercial zones is applicable to the underlying motor transportation performed for household goods forwarders by warehousemen and local motor vehicle operators because the former exemption applies only to regulated carriers who have a terminal area and the latter only to situations in which local service is not a part of a "package" arrangement. They argue that the arrangement offered by the exempt forwarders clearly constitutes a through service for which tariff rates must be charged by the underlying carrier serving it whether within or outside of the commercial zone, and that the local carriers holding themselves out as agents are performing service that is clearly incidental to through interstate movements rather than local service connected with packing and crating arrangements. They further contend that any service rendered to forwarders in the transportation of household goods must be rendered by a carrier authorized to handle

this commodity if loaded into a container which remains on the vehicle transporting it, citing *Western Exp. Co. Extension-Sealdtanks,* 84 M.C.C. 585.

Insofar as operations within a commercial zone are concerned, the independent forwarders answer that certificated carriers have been used by the forwarders to the extent required by law, and that the local services generally rendered are incidental to the primary business of containerization and decontainerization of shipments rather than to the through movement, that these limited pickup and delivery operations are local in nature and do not constitute through arrangements between carriers for continuous carriage, and that local movers and warehousemen have a historical right to perform local pickup, delivery and accessorial services in conjunction with containerized shipments of household goods moving in interstate or foreign commerce.

The independent forwarders further maintain that the motor vehicle operations of warehousemen and local movers serving forwarders operating under the section 402(b)(2) exemption should not be confined to the commercial zone of the point at which the local representatives are operating. They argue that the previous informal opinions of a bureau of the Commission support their position that no authority is required for warehousemen to transport goods which they have packed and crated if this transportation is incidental to the packing and crating services performed. They contend that in each case a determination of whether the transportation to be performed is incidental to the nontransportation activities performed should be made from the existing facts, citing *American Red Ball Transit Co., Inc.* v. *McLean Trucking,* 67 M.C.C. 305, 318.

Intervener National Furniture Warehousemen's Association contends that the examiner erred in failing to find that those providing short-haul pickup and delivery services between points located with a "service area," but not

within any point's commercial zone, require authority without a specific concomitant finding that the public convenience and necessity require a continuation of such service. If this position is not adopted, it urges the establishment of a simplified procedure under which the local operator may be granted some type of "grandfather" certificate.

The regulated motor carriers deny that local transportation is private carriage or merely an incident to a primary business of supplying a packing and containerization service and point out that this argument was specifically rejected in *Levin Extension of Operations—Household goods,* 47 M.C.C. 323. They also argue that the proposal of the intervenor, Warehousemen's Association, that the public interest requires a simplified procedure for warehousemen to obtain appropriate authority is fallacious because no need therefor exists and the criteria for granting certificates is limited to that expressed in the act.

The household goods forwarder, as the prime carrier, is required by virtue of its status and service to assume responsibility for the transportation of the property it handles from origin to destination, which here constitutes a move in interstate commerce. A through bill of lading is issued by the forwarder which evidences this responsibility, and in the course of its undertaking the forwarder must make appropriate arrangements for the physical moving of the goods through the medium of various carriers, including motor carriers performing pickup and delivery services. The motor carriers performing this underlying transportation pursuant to the through bill of lading are thus taking part in a through movement in interstate commerce.

The principal service contemplated is a transportation service. Such transportation is initiated or terminated by the local operator in his performance of a small portion of the total movement. Despite the fact that the percentage of the revenue received by him for actual transportation services is frequently small when compared to the portion

attributable to his packing or unpacking service and in relation to the total transportation cost of the entire movement, his transportation services are clearly performed solely for, in concert with, and as an incident to, the through transportation service rendered by the forwarder. It follows then, that unless they qualify for a specific exemption these local movers or operators of motor vehicles are subject to the specific requirements of the act including section 206 which requires motor carriers to possess appropriate authority for the transportation performed. We further note that such transportation is clearly not an unimportant incident to the primary business of packing and crating, which, as certain dicta in *American Red Ball Transit Co., Inc.* v. *McLean Trucking, supra,* indicates, might conceivably require no authority.

While the forwarder may be exempt from regulation under part IV of the act, this in no manner determines the status of the local motor operator serving it. The latter's status is determined by reference to part II of the act which specifically requires authority for operations subject to regulation. Compare *Movers' & Warehousemen's Assn. of America, Inc., Petition,* 304 I.C.C. 517.

The question here is what, if any, portion of the described motor operations being performed for the household goods forwarders is exempt. We have not been cited nor are we aware of possible exemptions provided in the act to cover the operations under consideration other than those relating to terminal areas and commercial zones. Thus it seems clear that the operations conducted beyond these areas require appropriate authority in all instances.

The partial exemption of section 202(c)(2)[4] exempts

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[4] Section 202(c) of the act provides:

Notwithstanding any provision of this section or of section 203, the provisions of this part [part II of the act], except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment,

motor carrier operations conducted for a forwarder operating under part IV within its terminal area, but this exemption clearly is not available to those motor carriers rendering such service for forwarders opearting under the section 402(b)(2) exemption because those served are not carriers subject to part IV of the act. See, e.g., *Trans-Caribbean M. Transport, Inc., Com. Car. Applic.*, 66 M.C.C. 593.

Section 203(b)(8)[5] of the act exempts certain transportation from economic regulation, but it contains an exception where the local transportation involved is under "a common control, management, or arrangement" for through transportation to or from a point outside that area. The evidence shows that the transportation involved in these proceedings from and to foreign countries is under a common arrangement for continuous carriage in interstate or foreign commerce. All of the parties concerned, the shipper, the forwarder, and the local carrier, know that the traffic handled is moving in this manner and the local serv-

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shall not apply * * * (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery services; * * *

[5] Section 203(b) of the act provides:

Nothing in this part [part II of the act], except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (8) the transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone * * *

ices performed by one carrier (the local carrier) for the other carrier with whom its arrangements are made (the forwarder) are not isolated nor performed separately and apart from the overall transportation undertaken by the forwarder. This local transportation thus being actually a part of the entire movement under a common arrangement for a continuous carriage clearly falls within the exception to the exemption and is, therefore, subject to regulation.

It is thus erroneous to assume, as contended, that the forwarder operating under the exemption is only a shipper arranging for a movement within a commercial zone, and that the transportation and arrangements made therefor fall within the exemption rather than the exception thereto, and we have consistently so held. Compare *Bleich Common Carrier Application, supra, Levine Extension of Operations —Household Goods, supra,* and *Movers' & Warehousemen's Assn. of America, Inc. Petition, supra.* While it cannot be gainsaid that the conclusions in *Bleich* decision which the examiner recommended be overruled were reached prior to the enactment of part IV of the act, the *Levine* proceeding was decided after the effective date of part IV and the principals applied as well as the conclusions reached in both are the same. It is true that, as an incident to its common carrier obligation, any carrier may assume the apparent status of a shipper, much the same as any common carrier by motor vehicle which accepts a piece of freight for delivery beyond its terminus and arranges for the movement of the same over the line of a connecting carrier thereby becomes a shipper as to that particular transaction. However, in such circumstances the originating carrier's principal characteristic is, and remains, that of a carrier rather than a shipper. The same is true of a forwarder, and the rationale of the *Bleich* proceeding applies here, particularly insofar as the conclusions reached are predicated upon the common carrier

status of a forwarder. Any doubt as to that status was removed by the 1950 amendments to the act which specifically clarified and affirmed this common carrier status. See H. Rept. 2489, (81 Cong., 2d Sess.), and S. Rept. 1285, (81 Cong., 2d Sess.).

The local carrier in the *Bleich* proceeding as well as in the circumstances here is serving a forwarding carrier and in doing so is performing a portion of the through service contracted for by this forwarding carrier. The local carrier has no contractual relationship with the shippers of the goods involved but only with another carrier, the forwarder, which arranges for and controls the total transportation service rendered on the shipment in interstate commerce in accordance with its undertaking. Thus, the service performed by the local carrier forms an integral part of this through common carriage movement. The movement therefore is specifically excepted from the section 203(b)(8) exemption relating to commercial zones.

The two proceedings cited in support of a contrary position[6] are not applicable for the relationship of the parties in the cited cases was entirely different than that existing here. The principal parties involved in those proceedings were clearly recognized and denominated as shippers who independently and separately, arranged for the "local" portion of the transportation performed and subsequently for the remainder of the transportation necessary for the shipments. They were then "shippers" and not carriers as is the case with the forwarder. In the movement of used household goods, where the shipper, whether government or civilian, separately contracts for a movement within a commercial zone, no operating authority from this Commission would be required for the motor carrier performing

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[6] *Atlanta Bonded Whse., Inc., Common Carrier Application,* 91 M.C.C. 104, and *Motor Transportation of Property Within Single State,* 94 M.C.C. 541.

such transportation since there is clearly no common arrangement between the local carrier and any other carrier hired by the shipper to transport the goods beyond the commercial zone.

In view of the facts disclosed in the record with regard to the manner in which local transportation has been performed, the positions taken by various parties on this question, and our conclusions as to the necessity for authority for such service, we feel that it would be appropriate to comment generally on this problem. It is apparent that this service has been performed for many years by local movers and warehousemen, either without authority, or, in the case of agents of nationwide certificated carriers, apparently independently of their agency agreements.

As indicated above, we realize that the informal opinion of one of our Bureaus stated that the motor operations of these local operators could be conducted without authority. Although such an opinion is not binding on the Commission, it gives a color of right to the operations conducted. Therefore, it would not be appropriate to permit operations conducted in reliance upon the Bureau's opinion to reflect upon the fitness of any party now that we have concluded that authority is required. However, because authority is required, an application under section 207 will have to be filed by each of these local carriers which has operated without authority and wishes to continue to provide its services for household goods forwarders. In any such application proceeding, of course, past operations conducted in good faith by a particular applicant will be entitled to appropriate weight.

The number of carriers that will be obliged to file these applications as a result of our interpretation of section 203(b)(8) is not precisely known. However, the estimate of 400 to 600 given at oral argument by the National Furniture Warehousemen's Association representing these local

carriers may well prove to be correct. We have already received approximately 250 applications for temporary authority. Nearly 200 applications for permanent authority are now awaiting assignment for hearing.

The burden upon these carriers of filing and prosecuting these applications, and the burden upon this Commission of processing them in addition to a heavy and mounting caseload causes us to look past the habits of many years and to reexamine critically our customary practice of holding oral hearings for motor carrier applications. Such a reexamination immediately reveals that, except to retain a longstanding custom, there is no practical necessity for an oral hearing to be held in every operating rights case, and that there is no legal requirement whatever for such a hearing.

The Administrative Procedure Act contains no requirement that hearings be held upon applications for licenses. That statute confines itself to a prescription of the type of hearing to be held where some other statute or (under the rule of *Wong Yang Sung* v. *McGrath*)[7] due process of law requires a hearing.

The Interstate Commerce Act specifically requires hearings for certain types of proceedings, but not for motor carrier applications. A hearing is expressly required by section 204(c) before the Commission may issue an order compelling compliance with part II of the act or with any requirement established pursuant to part II. Section 212 (a) similarly requires a hearing prior to suspension or revocation of any operating authority for failure to comply with the provisions of such an order. In the Motor Carrier Act, 1935, as originally enacted, a hearing was required by section 205 for all proceedings under part II. However, in 1938, this statutory requirement was eliminated by amend-

[7] 339 U.S. 33 (1950).

ment to section 205(f)[8] recommended by this Commission in order to "make procedure as simple and informal as possible, and expedite action." S. Doc. No. 154, 75th Cong., 3d Sess., pages 1 and 6. There is no remaining provision of the Interstate Commerce Act which would require a hearing to process an application for operating authority under part II.

Nor do we think that due process requires that there be a hearing upon every application. Clearly, an application for operating authority could not ultimately be denied without giving the applicant an opportunity to be heard. But where the decision is made to grant the application based upon an acceptable showing by an applicant, we do not believe that a party opposing the issuance of authority has an absolute right to an oral hearing. In the cases under consideration we think it is sufficient if, as now provided by section 205(e), interested parties are notified and allowed to protest and submit representations, and, if an oral hearing should be held, to participate in it. But we are aware of no Constitutional right to an oral hearing in opposition to the licensing of a prospective competitor.

Nor would a protestant become entitled to an oral hearing by virtue of the fact that failure to hold a hearing would amount to a departure from a past custom which was developed when our caseload was a small fraction of its present size. The administrative process may not be frozen so easily into an unalterable and possibly inefficient mold by the earlier procedural habits of the agency. We must be free, within the confines of the Constitution and our statute, to adjust our procedures to meet the changing demands of our workload, and to make the best use of the facilities available to us, so that in fairness to the parties we may dispose of proceedings as promptly as circumstances permit.

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[8] Now 205(e).

There being no requirement of law to the contrary, we conclude that an oral hearing of each of these applications is not absolutely required, and, at least at this juncture, has not been shown to be desirable. Therefore, in the handling of the application cases arising out of this proceeding (and only for such cases) we now consider it proper to dispense with the usual formalized procedures, for the most part. Accordingly, each application for authority to continue the type of past localized operations considered in this proceeding will be handled, insofar as possible, without oral adversary hearings. Each applicant whose request for authority is territorially limited in scope to the area of its prior holding out, should, therefore, in order to avoid the necessity for further proof, append to its application statements in verified form sufficient to establish its entitlement to the authority sought. Any application which has already been filed may of course be amended to conform to these requirements. Protests and representations of others which are believed to bear upon an applicant's entitlement to authority may be filed by interested parties, but oral hearings will not be held unless in the judgment of the Commission such procedure will assist materially in reaching a prompt and fair decision upon the application. The procedures to be followed are those contained in our Rules of Practice, sections 1.45 to 1.54.

We realize that nationwide household goods carriers and numerous other carriers operating in limited geographical areas possess nonradial authority under which operations for forwarders can be performed but which also authorize services which are not related to the forwarding operations discussed herein. In order to distinguish the service to be performed for forwarders from that now performed by these regulated household goods carriers we believe that specific limitations should be placed in certificates that may be issued for local motor services in connection with forwarder operations. Thus, in the absence of other circum-

stances, it appears that a local motor carrier could perform an adequate service for a household goods forwarder if its authority were limited to that necessary (1) to serve only points within commercial zones of municipalities and specifically described areas immediately adjacent thereto, (2) for the transportation of used household goods, (3) to shipments moving on the through bill of lading of a forwarder operating under the section 402(b)(2) exemption, and (4) to shipments having an immediately prior or subsequent line-haul movement by rail, motor, water or air. The fact that a proposed motor service is to be limited to providing a local service for a forwarder of used household goods should be indicated in the applications for such authority, and notice of this limitation will be included in the appropriate Federal Register publication. Where the application has already been filed, applicants should inform this Commission and any protestant of record if the authority sought is to be used solely in conjunction with the operation of exempt forwarders of used household goods and whether the indicated limitations accurately reflect the contemplated scope of their respective operations.

Closing Observations

We have attempted to set forth criteria which should preserve to the public the inherent and substantial merits of the various methods of handling household goods while protecting the shippers from injurious and abusive practices. They should serve to aid the parties and their counterparts to operate in a manner which will assure their continued compliance with the requirements of the act. The criteria should likewise insure sound relations between the various segments of the moving industry as well as those whose services they utilize so as to preserve a national transportation system adequate to meet the needs of the commerce of the nation and of the national defense. Further, those contentions and few exceptions to the examiner's factual statement not specifically discussed nor reflected in our

findings have been considered and found to be either not justified or unnecessary to a proper determination of the issues.

In proceedings of this character, we do not find it necessary or advisable to issue specific orders directed to individual respondents or defendants. The unauthorized operations that were conducted were under a color of right; few appropriate guidelines have existed heretofore; there are infirmities in the record respecting the scope of the commodities transported; and it would not be possible to here issue affirmative orders directed to a significant number of the persons now known to be engaged in operations of the types described in this report. Therefore, cease and desist orders against the respondents and defendants in the titled proceeding and No. FF-C-14 will not be issued, and there is no real need for the declaratory order requested in No. FF-C-20. In these circumstances, we have necessarily limited our consideration to the expression of the principles which are to be applied in the future determination of specific problems, should they arise. It is realized that in the subsequent application of these principles to specific situations, occasion may arise for their modification or even for the addition of other principles.

Findings

Upon the facts of record and in light of the foregoing discussion, we find:

1. In No. MC-C-4455, the investigation should be discontinued;

2. In No. FF-C-14, the complaint should be dismissed; and

3. In No. FF-C-20, the petition insofar as it seeks issuance of a declaratory order should be denied.

An appropriate order will be issued.

COMMISSIONERS WEBB, TIERNEY, and DEASON, concurring:

We agree with the result reached by the majority but would not schedule hearings, either oral or under modified procedure, on the 400 to 600 local motor carrier applications which, as recognized by the decision herein, do not involve issues of significant transportation importance.

The majority recognizes, correctly in our opinion, that neither the Interstate Commerce Act nor the Administrative Procedure Act requires hearings to be held on applications for motor carrier operating authority. Section 205(e) of the act specifically provides that the holding of a hearing is discretionary. Prior to amendment of the Motor Carrier Act of 1935 in 1938, a hearing was required by section 205 for all proceedings under part II but, as noted by the majority, the statutory requirement for a hearing was eliminated to enable the Commission to "make procedure as simple and informal as possible, and expedite action." S. Doc. No. 154, 75th Cong., 3d Sess., pages 1 and 6.

Notwithstanding the Commission's power to dispense with hearings on the 400 to 600 motor carrier applications involved, the majority has decided to hold a hearing on each application. For the most part, except of course as to the applicants involved, the cases are trivial and, in view of past operations under a color of right, the result is foreordained in practically every case. In these circumstances it seems wasteful and unnecessary to resort to a formal, adversary procedure established 24 years ago and to imply that such action is a bold procedural innovation. Handling the 400 to 600 applications in question under the modified procedure type of hearing may be slightly more expeditious than setting them for oral hearing, but either method will be far more time-consuming than dispensing with hearings altogether.

The Commission's backlog continues to grow while its staff continues to shrink. The Commission should not be

heard to complain unless and until it exhausts all possibilities of self-help. We believe that the local motor carrier applications prepared and filed in the manner prescribed by the decision herein and having no significant transportation importance should be granted without hearings or further proceedings if, after such informal investigation as seems desirable, the Commission determines that the statutory criteria have been satisfied. We agree with the majority that no application could be denied without a hearing if the unsuccessful applicant asked to be heard.

COMMISSIONER FREAS, dissenting in part:

I do not agree that the joint loading of separate individual shipments of multiple forwarders is the same as consolidation as contemplated by section 402(a)(5). In addition to permitting joint loading at inland points, the majority decision would permit the movement of individual shipments to an outbound port where joint loading could be effected for the water movement. Both types of operation are considered by the majority as meeting the requirements of section 402(a)(5). The result, as I see it, would invite motor carriers to form subsidiary forwarding organizations to avoid regulation. It follows that the decision of the majority could result in relinquishing from regulation a substantial segment of the movement of household goods.

COMMISSIONER BROWN, dissenting:

With the stroke of a pen, the Commission has by its own admission brought under regulation upwards of 600 local warehousemen who for over 30 years have provided local terminal and warehouse services for exempt freight forwarders or who, as local agents, have provided similar services for one of the regulated national van lines. Before the ink is dry, the Commission's heavy caseload will be increased by over 5 percent.

The justification, in the majority's closing observations, appears to stem from a need to protect "shippers from injurious and abusive practices". From my analysis, the record is barren on this subject. The largest shipper involved, the Department of Defense, made no appearance to support this concern. In light of this, I conclude that concern for the shippers would not appear to be a material consideration.

I

I dissent to this report because I find no basis in fact or in law for the conclusions reached by the majority. No shippers are crying to the Commission for protection from abuses. On the contrary, present practices enable DOD to arrange for the movement of household goods at the most economical means possible for overseas personnel. Regulation must have meaning. The Congress, in its wisdom, could not have intended for the Commission to regulate for regulation's sake alone. In my judgment, the Congressional intent was stewardship of the act in a manner consistent with all aspects of the public interest.

This includes the direct cost of regulation such as the public costs for the Commission to handle the 600 cases here. I would conservatively estimate that these costs would be upwards of $250,000 to $500,000. It also includes an appreciation of the indirect costs to the shipping public. These warehousemen's costs of doing business will be increased—attorneys' fees for licensing and additional regulatory bookkeeping expenses, which costs ultimately will be passed on to the shippers. So who wins? We know who loses. I am concerned with who should win.

II

Since the assumption by the United States of a more responsible role in the affairs of the family of nations throughout the world and the growth of overseas military

activity, many of its citizens—both military and civilian—and their families have undertaken roles in the defense of freedom at overseas posts. For purposes of morale nothing can substitute for the household effects of these families. In this case the Department of Defense is the largest shipper. Involved before us are the means by which household goods are moved for these people. The destinations are to out-of-the way places involving various means of transportation and some form of containerization is the only effective and efficient way to move the goods.

The service rendered was initially of two types. The first of these was the so-called "pack and crate" service where the local warehouseman provided only terminal services at origin and the shipper himself arranged for the line-haul transportation and forwarding of the shipment and for destination services. The warehouseman also provided the local drayage service.

After the war many warehouse companies continued to provide the same type of forwarding service which they had been providing before the war. The company made all arrangements for a through service to an overseas port, often through overseas correspondents, to final destination, including the furnishing of large steel or wooden containers known as "lift vans." Such companies also receive shipments from overseas points and provide destination services either on order of the owner of the goods or of the overseas warehouseman which arranged the forwarding to this country.

About 1954, motor van-sea van service was introduced. This service consisted of a through movement to or from an inland city. A motor van transported the loose household goods between the inland city and a seaport. There, containerization and consolidation or break-bulk and unloading the containers and the ultimate movement of the loaded container to or from a foreign port via water carrier were performed.

Two years later the more efficient door-to-door through container method of shipping appeared and thereafter largely supplanted the motor van-sea van mode because of its greater inherent economy. In this mode of shipment the container is loaded at the origin residence or a nearby warehouse and forwarded via a combination of general commodity motor carrier or railroad carrier and ocean carrier to the resident at destination, where it is then unloaded.

With the development of this system, the freight forwarder emerged as a leading contender of the van-line for overseas household goods traffic, and particularly for government traffic. These forwarders contracted with local warehousemen to provide terminal services and with port handling agents to arrange for ocean freight documentation and customs clearance, though a few firms provided their own port handling services.

III

At no place in the report does the majority attempt to accommodate the various sections of the act. A local warehouseman who performs services within the terminal area of a regulated forwarder is exempt for those operations within the forwarder's terminal area. Yet a local warehouseman who performs the identical service for a forwarder who claims exemption under 402(b)(2) must, under the majority's finding, now be licensed. Similarly, the operations of a local agent for a national van line must now be licensed even for operations within the ordinarily exempt commercial zone. Since the national van line is already licensed, the result is virtually double regulation.

IV

It is shocking to me to see definitions of fair procedure twisted to such rigid form. Due process, like most great principles of law, is a guide rather than a formula which dictates a certain result. Whether or not there should be

oral hearings, it seems to me, is left by statute to the sound discretion of the Commission. This the majority concedes. But in applying the principle of due process the majority takes away from itself the discretion allowed by statute.

Doctrines defining fair procedure are not and should not be taken too rigidly. They should not be applied in the face of circumstances that clearly call for special rules.

Most rules, particularly most general principles of law, are guides rather than formulas dictating a decision.

> "Rules and principles have tremendous important functions; but if they are taken to exclude a * * * [Commissioner's] appreciation of the special instance, if they are thought of as precise determinants, they become our masters rather than our servants."
>
> "A particularized response to a special case is a sign of a healthy and confident legal system, a system at once sophisticated and sensitive."[9]

V

The Commission here had a rare chance to demonstrate the ability of the administrative process to meet new and changing circumstances. In its annual reports to the Congress and in its appropriation hearings, the Commission consistently emphasizes the burdens of its caseload. Today, without flinching, the Commission has increased that burden over 5 percent. With its left hand, the Commission has dropped these 600 cases in a basket at its own doorstep like an unwanted child shivering in the cold. The least the Commission could have done, with its right hand, would have been to remove the chill from the basket by providing a blanket no-hearing procedure.

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[9] Jaffe, *Administrative Law; Burden of Proof and Scope of Review*, 79 Harv. L. Rev. 914, 920 (1966).

Appendix A

Principal respondents

Von Der Ahe Van Lines, Inc., Fenton, Mo.
Columbia Export Packers, Inc., Torrance, Calif.
International Sea Van, Inc., Evansville, Ind.
Smyth Worldwide Movers, Inc., Seattle, Wash.
Routed Thru-Pac, Inc., New York, N. Y.
Home-Pack Transport, Inc., Brooklyn, N. Y.
Vanpac Carriers, Inc., Richmond, Calif.
Imperial Household Shipping Co., Inc., Long Beach, Calif.
Global Van Lines, Inc., Los Angeles, Calif.
Royal Household Goods Shipping Co., Inc., New York
New Orleans Shipping Co., New Orleans, La.
North American Van Lines, Fort Wayne, Ind.
Martin Van Lines, Seattle, Wash.

Appendix B

Secondary respondents[1]

McCormack-Payton Storage and Moving Company
dba, Home Pac, Kansas City
New Orleans Shipping Co., New Orleans
Trans-American Van Service, Inc., Chicago, Ill.
International Van Service of Gretna, La.[1]
Fred Schafer, dba Canton-Quincy Transfer, Canton, Mo.
Velvin Transfer and Storage Co., Inc Henderson, Tex.
McClain Moving Company, Camden, N. J.
Richmond Export Services, Inc., Richmond
Fogarty Bros. Transfer, Inc., Tampa, Fla.
United Moving and Storage, Inc., Columbus, Ohio
Transcontinental Movers, Lincoln, Nebr.
Smyth Overseas Van Lines, Seattle

[1] The Bureau of Enforcement's motion to discontinue the proceeding as to respondent, International Van Service, of Gretna, La. for the reasons indicated at hearing is hereby granted and the above list of respondents will be considered amended accordingly.

Columbia Export Packers, Inc., New Orleans
General Terminals, Inc., New Orleans
Cartwright's Moving & Storage, Inc., Kansas City
Mosca Bros. Moving & Storage, Rome, N. Y.
Washburn Storage Company, Macon, Ga.
Shipside Agents, New Orleans
Capitol Van and Storage Co., Phoenix, Ariz.
Van Der Ahe Lines, Inc., Fenton
Ellis Forwarding Company, Houston, Tex.
B & B Services, Inc., Columbus, Ga.
Imperial Van and Storage, Austin, Tex.
United Moving and Storage, Inc., Dayton, Ohio
Williams Transportation & Storage Co., Leesville, La.
Acme Van Co., Port Newark, N. J.
L & L Van Lines, Inc., El Dorado, Kansas
Imperial Van & Storage, Inc., Long Beach, Calif.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of December 1966.

No. MC-C-4455

KINGPAK, INC., INVESTIGATION OF OPERATIONS

No. FF-C-14

UNITED VAN LINES, INC., V. CONTAINER TRANSPORT INTERNATIONAL, INC. ET AL.

No. FF-C-20

HOUSEHOLD GOODS CARRIER BUREAU DETERMINATION OF LAWFUL SERVICES OF NON-REGULATED FORWARDERS OF USED HOUSEHOLD GOODS

Investigation of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed a report herein con-

taining its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That the investigation in No. MC-C-4455 be, and it is hereby discontinued.

It is further ordered, That the complaint in No. FF-C-14, be, and it is hereby, dismissed.

And it is further ordered, That the petition in the proceeding in No. FF-C-20 be, and it is hereby denied.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX C

National Transportation Policy

49 U. S. C., *preceding* §§ 1, 301, 901, and 1001. It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 207 of the Interstate Commerce Act, 49 U.S.C. § 307:

> "(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public

convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

"(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways."

Section 402(a)(5) and (6) of Interstate Commerce Act, 49 U.S.C. 1002(a)(5) and (6):

"For the purposes of this part • • •

(5) The term 'freight forwarder' means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act."

(6) The term "interstate commerce" means transportation (A) between a point in a State and a point in another State, whether or not such transportation takes place wholly within the United States; (B) be-

tween points within the same State but through any place outside thereof; or (C) from or to any point in the United States to or from any point outside thereof, but only insofar as such transportation takes place within the United States.

Section 402(b) of Interstate Commerce Act, 49 U.S.C. § 1002(b):

"(b) The provisions of this part shall not apply * * * (2) where the property with respect to which service is performed consists of * * * used household goods, if the person performing such service engages in service subject to this part with respect to not more than one of the classifications of property above specified:"

Section 404(d) of the Interstate Commerce Act, 49 U.S.C. § 1004(d):

"Nothing in this part shall be construed to prohibit any freight forwarder from entering into an agreement with another freight forwarder for the joint loading of traffic between points in transportation subject to this part, except that the Commission may cancel, suspend, or require the modification of any such agreement which it finds, after reasonable opportunity for hearing, to be inconsistent with the national transportation policy declared in this Act."

Section 418 of the Interstate Commerce Act, 49 U.S.C. § 1018:

"It shall be unlawful, except in the performance within terminal areas of transfer, collection, or delivery services, for freight forwarders to employ or utilize the instrumentalities or services of any carriers other than common carriers by railroad, motor vehicle, or water, subject to this Act; express companies sub-

ject to this Act; air carriers subject to the Civil Aeronautics Act of 1938, as amended; common carriers by motor vehicle engaged in transportation exempted under the provisions of section 203(b) (7a) of this Act; common carriers by motor vehicle exempted under the provisions of section 204(a) (4a) of this Act; or common carriers by water engaged in transportation exempted under the provisions of section 303(b) of this Act."

Section 5, Administrative Procedure Act, now 5 U.S.C. 554:

"This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * * "

Section 10(e) of Administrative Procedure Act, now 5 U.S.C. 706:

"To the extent necessary to decision and when presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall (1) compel agency action unlawfully withheld or unreasonably delayed; and * * * "

SUPREME COURT, U. S.

NOV 7 1968

JOHN F. DAVIS, CLERK

No. 615

In the Supreme Court of the United States

OCTOBER TERM, 1968

HOUSEHOLD GOODS CARRIERS' BUREAU, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

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INDEX

	Page
Statement	1
Argument	6
Conclusion	10

CITATIONS

Cases:

Akers Motor Lines, Inc. v. *United States*, 286 F. Supp. 213 — 8

Freight Forwarders Institute v. *United States*, 263 F. Supp. 460 — 8

Motor Convoy, Inc. v. *United States*, 235 F. Supp. 250, *affirmed per curiam*, 381 U.S. 436 — 9

National Labor Relations Board v. *Hearst Publications, Inc.*, 322 U.S. 111 — 7

Porter Co. v. *Central Vermont R. Co.*, 366 U.S. 272 — 7

Statutes:

Interstate Commerce Act, 49 U.S.C. 1 *et seq.*:

(49 U.S.C. 1002 (a)(5)) — 3, 4

(49 U.S.C. 1002 (a)(6)(C)) — 7

(49 U.S.C. 1002 (b)) — 2

(49 U.S.C. 1004 (d)) — 6

325-001—68

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HOUSEHOLD GOODS CARRIERS' BUREAU, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission jointly move that the judgment of the three-judge district court be affirmed.

STATEMENT

This is an appeal from the judgment of a three-judge district court unanimously sustaining a decision of the Interstate Commerce Commission. The Commission decided that certain operations involving containerized overseas shipment of household goods qualify as "freight forwarding" and thus may law-

fully be carried on without regulation under Part IV of the Interstate Commerce Act and also decided certain related questions.

Appellants are motor carriers of household goods certificated under Part II of the Act. Carriers such as the appellants handle almost all transportation of household goods within the continental United States (J.S. 13a). The goods are loaded onto a van at the point of origin, transported by highway, and unloaded at destination. For many years, the overseas movement of used household goods was also handled primarily by such motor carriers; the goods were loaded onto a van at origin and transported by highway to the carrier's warehouse, reloaded onto a second van for movement to the dock, reloaded again onto the ocean carrier, and finally reloaded onto another van at the overseas dock for movement to the destination (J.S. 14a–15a).

More recently, however, containerization has developed as a competing method of handling overseas shipments of used household goods. The goods are packed in a large container at or near the point of origin, and the container is then transported by regulated motor, rail and ocean carriers to the final destination, eliminating the need to reload the goods in transit (J.S. 2a, 15a–16a). The arrangements for such containerized shipments, for which the Department of Defense is by far the largest customer (J.S. 14a), are generally handled by companies claiming to be free from regulation under the exemption in the Interstate Commerce Act for freight forwarders of used household goods (49 U.S.C. 1002(b)).

Whether or not the activities of the companies arranging containerized shipments of household goods

are legal thus depends on whether or not such companies qualify as "freight forwarders." Section 402(a)(5) of the Act (49 U.S.C. 1002(a)(5)) defines a "freight forwarder" as a common carrier of property (other than a carrier subject to Parts I–III of the Act) which "(A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to [Part I, II, or III of the Act]."

Because a single freight forwarder rarely has by itself sufficient traffic in overseas shipments of household goods, coincident in time and place, to enable it to make up a full carload lot, a practice has developed whereby two or more freight forwarders combine their shipments onto the same truck or car and thereby obtain the more favorable full carload rate (J.S. 3a, 16a–17a). Such combining of shipments of two or more forwarders is referred to as "joint loading" (J.S. 3a, 17a, n. 3). The arrangements for the line-haul movement and joint loading are frequently handled by traffic management companies acting as agents for large numbers of forwarders (*ibid.*).

In this proceeding the Commission considered for the first time whether these operations and practices associated with containerized shipments of household goods qualify as activities of a "freight forwarder"

under the Act.[1] First, the Commission held that the statutory requirement of consolidation (see Section 402(a)(5), *supra*) is satisfied by joint loading, in which the shipments of several forwarders are combined, as well as by the combining of the shipments of a single forwarder (J.S. 22a–25a). Second, the Commission held that consolidation qualifies under Section 402(a)(5) if it is effected at a port or outside the country; the statute does not require transportation of the consolidated shipments within the United States, but only that a portion of the through movement before or after consolidation take place within the United States (J.S. 22a, 26a–27a).

The Commission observed, however, that "in some few instances" forwarders engaged in these operations, "are no more than names and * * * all, or nearly all forwarding functions are being performed by traffic management companies" (J.S. 27a–28a). In an effort to correct such conditions, the Commission enumerated certain criteria as guides to the relationships between forwarders and their agents (J.S. 28a–30a) consistent with the statutory exemption. It declined to issue cease-and-desist orders against specific forwarders and found no need to issue a declaratory order with respect to the legality of particular agency practices (J.S. 47a).

Finally, the Commission held that certain local motor carrier operations on behalf of such freight

[1] The case involves three related proceedings—an investigation instituted on the Commission's motion, a complaint, and a petition for a declaratory order—heard together on a consolidated record (J.S. 11a).

forwarders, previously assumed to be exempt from Commission regulation, are in fact subject to the certificate requirements of the Interstate Commerce Act (J.S. 34a–42a). These operations involve pickup and delivery of goods before and after containerization. The Commission noted that, as a result of its ruling, as many as 600 carriers may be obliged to file applications for authority to continue their operations, thereby imposing a heavy burden on the Commission as well as on the carriers (J.S. 42a–43a). In these circumstances, the Commission announced that applications by motor carriers seeking to continue their prior localized operations would be handled, "insofar as possible," on the basis of documentary presentations, and that oral hearings would be held only where "in the judgment of the Commission * * * [they] will assist materially in reaching a prompt and fair decision" (J.S. 45a).

The district court sustained the Commission's interpretation of the statute (J.S. 3a–5a) and held that the Commission's articulation of forwarder-agent guidelines was an adequate disposition of the consolidated proceedings before it. The court rejected as premature (J.S. 6a–7a) appellants' attack upon the Commission's announced intention to process some local motor carrier certificate applications without oral hearings, noting that not one final application had yet been acted upon, that interested parties "may file protests and assert their right to a full oral hearing," and that "such hearings may still be held in the judgment of the Commission" (J.S. 8a–9a).

ARGUMENT

The contentions advanced here by appellants (carriers who compete with freight forwarders) were considered and rejected by the Commission and by the court below. The decision of the district court is correct and should be affirmed.

1. There is no language in section 402(a)(5) of the Interstate Commerce Act requiring that a freight forwarder's consolidations of shipments involve two or more shipments of his own. (J.S. 4a).[2]

A single forwarder rarely has sufficient traffic at any one time to permit him to effect consolidation of shipments originating in his own service (J.S. 3a), the result in large part of the Department of Defense policy of allotting shipments on a rotation basis (J.S. 14a). The interpretation advocated by the appellants would result either in depriving the shipping public of the advantages of the containerized service offered by the forwarders, or, if the forwarders continued to handle the traffic, in unnecessary delays in transportation, with each forwarder compelled to hold shipments until they could be combined for the same destination. "There is nothing in the language of the

[2] The legislative history relied upon by appellants (J.S. 7–11) does not require a different conclusion. While some form of joint loading was evidently employed by forwarders when Part IV was enacted in 1942 (see 49 U.S.C. 1004(d)), the practice of joint loading in connection with containerized shipments is a relatively recent development. At most, the cited legislative history indicates that Congress did not specifically consider the issue presented here. The court below properly accorded great weight to the Commission's interpretation of the statute it administers and declined to interfere with that interpretation "in the absence of compelling reasons" (J.S. 3a).

statute to compel such a result" (J.S. 4a), and the Commission's interpretation has an entirely "reasonable basis in law," *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131.

2. Appellants further claim that the statute requires transportation of the consolidated shipment within the United States and, therefore, that statutory consolidation may not be effected at ports or outside the country. As the Commission noted (J.S. 26a), however, "the definition of a freight forwarder does not require that the operations described as essential for forwarder status be performed within the United States, only that they be performed." The Act encompasses all forwarders conducting interstate or foreign operations "insofar as such transportation takes place within the United States" (49 U.S.C. 1002(a)(6)(C)), and this has consistently been construed by the Commission as embracing forwarders who perform any part of the through transportation service within the United States.[3] Cf. *Porter Co.* v. *Central Vermont R. Co.*, 366 U.S. 272, 274–275. In the challenged instances here, the forwarders perform the assembly movement to the port within the United States, and consolidation occurs either at the port or aboard ship. This is sufficient to bring the forwarding operations within the scope of the statute.

3. The Commission plainly acted within its discre-

[3] As the court below noted (J.S. 5a), the Commission has regularly asserted jurisdiction over forwarders where one or more of the four necessary operations of freight forwarding (*i.e.*, assembly, consolidation, break-bulk, and distribution) have occurred outside the United States. See, *e.g.*, the cases cited by the court below (J.S. 5a).

tion in choice of remedy by setting forth guidelines for future forwarder-agent relationships while declining to issue a declaratory order or cease-and-desist orders against individual carriers.[4] As the court said, "in substance the relief [sought by the petition for declaratory order] has been granted" by issuance of the guidelines, which removed "[a]ny earlier uncertainty which might have existed"; and "since cease and desist orders operate prospectively compliance with the new guidelines would render any such orders moot" (J.S. 7a). The court thus correctly held that issuance of the guidelines "was an adequate disposition of not only the Commission's investigation but of the other two consolidated proceedings as well" (*ibid.*).[5]

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[4] The Commission explicitly noted that the operations "were conducted under a color of right; few appropriate guidelines have existed heretofore; there are infirmities in the record respecting the scope of the commodities transported; and it would not be possible to here issue affirmative orders directed to a significant number of the persons now known be engaged in [these] operations" (J.S. 47a).

[5] The cases cited by appellants (J.S. 15) are inapposite. In *Freight Forwarders Institute* v. *United States*, 263 F. Supp. 460 (S.D. N.Y.), the court held the Commission had erred in failing to decide whether a non-regulated shipper association may engage in joint loading of its trailers, where the association in question indicated it intended to continue the practice (263 F. Supp. at 466–467). In *Akers Motor Lines, Inc.* v. *United States*, 286 F. Supp. 213 (W.D. N.C.), the Commission construed a motor carrier certificate as authorizing certain operations but declined, for insubstantial reasons, to decide whether the inadvertent issuance of the certificate had illegally enlarged the scope of the carrier's authority. In the case at bar, the Commission did not ignore the problem of forwarder-agent relations but dealt with it effectively by issuing guidelines designed to resolve prevailing uncertainty on the matter.

4. Finally, the court below properly held that the appellants' broadside challenge to the Commission's procedures for handling of individual applications which may be filed by local motor carriers was premature. The Commission has done no more than announce its intention to consider such applications, to the greatest extent possible, upon the basis of written representations. The propriety of an agency's denial of an oral hearing in particular cases where there are no material issues of fact in dispute is well established (*e.g., Motor Convoy, Inc.* v. *United States,* 235 F. Supp. 250 (N.D. Ga.), affirmed *per curiam,* 381 U.S. 436). The Commission has stated that hearings will be held where they "will assist materially in reaching a prompt and fair decision" (J.S. 45a), and any refusal to conduct a hearing in a particular case will be subject to judicial review.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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No. 615

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

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Appellants,

v.

THE UNITED STATES OF AMERICA
AND
INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal From the United States District Court for the Northern District of California

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MOTION TO AFFIRM

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November 6, 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 615

HOUSEHOLD GOODS CARRIERS' BUREAU, ET AL.,

Appellants,

v.

THE UNITED STATES OF AMERICA
AND
INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

On Appeal From the United States District Court for the Northern District of California

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Household Goods Forwarders Association of America, Inc., CTI-Container Transport International, Inc., Columbia Export Packers, Inc., Home-Pack Transport, Inc., Imperial Household Shipping Co., Inc., Routed Thru-Pac, Inc., Smyth Worldwide Movers, Inc. and Vanpac Carriers, Inc., Intervening Defendants in the proceeding below, jointly move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a Three-Judge District Court unanimously dismissing appellants' suit to set aside two orders of the Interstate Commerce Commission issued in *Kingpak, Inc., Investigation of Operations,* 103 M.C.C. 318 (1966).

The proceedings before the Commission had their origin in complaints and petitions filed by appellant household goods carriers and their rate filing bureau to have declared unlawful a successful innovation in the transportation of household goods, developed and perfected by intervening appellees, known as the Door-to-Door Container Service. As the Interstate Commerce Commission found, Door-to-Door Container Service permits the movement of household goods from residence to residence in a container eliminating rehandling of the shipment in transit, and often at a more economical rate, which service resulted from the rapid improvement in containerization, and which service was offered by the exempt freight forwarders. *Kingpak, Inc., Investigation of Operations, supra,* p. 321. This new containerized service uses rail carriers, certificated general commodity carriers, certificated van lines, air carriers, and water carriers operating under the jurisdiction of the Federal Maritime Commission to move shipments in the manner best suited for the needs of the shipper. This service competes with the services of appellants which is limited under their I.C.C. certificates to movements of household goods loose in vans, in the conventional manner, and which involves the rehandling referred to by the Commission. It is the shipper acceptance of the Door-to-Door Container Service which underlies the present litigation.

Although extensive hearings were held before the Commission resulting in a comprehensive record, appellants chose in making its appeal to the Three-Judge District Court not to present any part of the record below. As a result,

there is no issue in this case that the Commission acted arbitrarily or capriciously, or that the evidence of record did not support its conclusions, the appeal being artificially restricted to certain "legal" issues, with no consideration being given to the substantial factual foundation upon which the Commission's conclusions are posited.

In a detailed opinion, the Three-Judge Court carefully analyzed each and every argument raised by appellants and concluded that the action of the entire Commission below was proper in every respect.

QUESTIONS PRESENTED

1. Has the Court erred in affirming the decision of the Interstate Commerce Commission that joint loading is a form of shipment consolidation within the purview of the Interstate Commerce Act?

2. Has the Court erred in affirming the Commission's consistent holding that it can properly regulate that part of a freight forwarding operation which takes place within the United States?

3. Has the Court erred in following the procedure of terminating this lengthy litigation after issuing specific guidelines for the future operation of the Door-to-Door Container Service?

4. Has the Court erred in affirming the Commission's right to announce its intention to process over 200 applications for limited local motor carrier authority under so-called modified procedure, rather than to set each application for full oral hearing?

ARGUMENT

We respectfully submit that the subject case, wherein appellants have had a thorough hearing and consideration before the Interstate Commerce Commission and before a Three-Judge Court, is not a case which warrants plenary consideration by the Supreme Court. See *National Motor Freight Traffic Assn., Inc., et al. v. The United States of America and Interstate Commerce Commission, et al.*, October Term, 1968, No. 355.

Apparently in their zeal to generate interest and enhance the importance of this case, appellants make an unfortunate misstatement. They argue that unless the decision below is overturned, motor carriers may be forced "into a satellite status, *vis-a-vis,* the forwarders" and there is then a statement that these forwarders are authorized "to contract with motor carriers at other than [less than] tariff rates for most of the physical services for which a forwarder must use a regulated motor carrier." (Appellants' Jurisdictional statement, p. 6). As the Commission and the Court below found, the forwarders here involved are specifically exempted from the Interstate Commerce Act for the transportation of their commodity, *viz.*, used household goods, under Section 402(b)(2) of the Act. *Cf.*, "The case here is one in which the operations of the third parties [forwarders] are exempt from regulation . . . " (Appellants' Jurisdictional Statement, p. 7). There is no provision in the Interstate Commerce Act, nor is there one cited which permits an exempt forwarder to pay underlying carriers anything other than tariff rates. In fact, the Interstate Commerce Commission specifically held in the proceeding below that the freight forwarders involved in this proceeding were required to pay full tariff rates. Thus the primary basis relied upon by appellants in seeking to interest the United States Supreme Court in a detailed review of the decision is erroneous.

1. Appellants first argue that the Commission and the Three-Judge Court were in error in holding that the joint loading of containers is a form of consolidation. Not only is this attack on the decision below not supported by a single case, but no attempt is even made to distinguish the cases upon which the Commission and the Court below relied in reaching their conclusion. Appellants rely solely upon a reargument of its very own version of selected exerpts from the legislative history of the Interstate Commerce Act. The distortions, omissions and conclusory interpretations by appellants were properly evaluated by the Commission and the Court below, and rejected.

In its most favorable light, the legislative history referred to by appellants shows that in connection with the regulation of freight forwarders of other than exempt commodities, *viz.*, used household goods, Congress feared the creation of a super regulated forwarding agency which would have control of the routing of all traffic. (Jurisdictional Statement, p. 11). As a result, in enacting Part IV of the Interstate Commerce Act, Congress prohibited one forwarder from using the services of another, while carving out a specific exception from this prohibition to permit joint loading between regulated forwarders.

Obviously, this specific statutory permission to engage in joint loading is not required for forwarders exempt from the entire terms of the subject statute. In other words, appellants are renewing their argument, without additional support, already rejected by the Commission and the Court, that joint loading is a form of consolidation reserved solely for regulated forwarders. *Kingpak, supra,* p. 328.

We also point out that appellants do not distinguish the cases relied upon by the Commission and the Court in concluding that consolidation of shipments can be performed in many ways, including joint loading, citing *Hopke, Freight Forwarder Application,* 265 I.C.C. 726 (1950); *Barge Service Corp., Freight Forwarder Application,*

285 I.C.C. 249 (1953); *Twin City Shippers Association, Freight Forwarder Application,* 260 I.C.C. 307 (1944); *Kelley, Freight Forwarder Application,* 260 I.C.C. 315 (1944); *Empire Freight Co., Freight Forwarder Application,* 265 I.C.C. 109 (1947).

2. Turning to their next proposition appellants argue, again without any case support, that the Commission and the Three-Judge Court were wrong in holding that the Interstate Commerce Commission could properly regulate that part of a freight forwarder operation which took place between points in the United States. It is interesting to note that the persons who are potentially subject to regulation, *viz.*, the intervening appellees, do not oppose this exercise of Commission jurisdiction; it is difficult to even understand how regulated carriers, *viz.*, the appellants, could have any legitimate objection to the Commission's assertion of regulatory jurisdiction over their competitors.

Beyond this, the Commission consistently since 1948 has asserted jurisdiction over that part of forwarding operations conducted between the United States and foreign countries to the extent that part of such movement occurred within the United States. Appellants fail to distinguish the cases relied upon by the Commission and the Court as follows: *Adanac Freight Forwarders Ltd., Freight Forwarder Application,* 265 I.C.C. 493 (1948); *B.C. Forwarding Co., Freight Forwarder Application,* 265 I.C.C. 308 (1948); *Chi-Can Freight Forwarding Ltd., Freight Forwarder Application,* 310 I.C.C. 693 (1960); *National Carloading Corp., Alaska and Hawaii "Grandfather" Application,* 323 I.C.C. 195 (1964); and *Alltransport Incorporated, Freight Forwarder Application,* 325 I.C.C. 183 (1965).

Appellants' argument is based solely upon the definition of "interstate or foreign commerce". However the legislative history cited by appellants merely establishes that interstate and foreign commerce were defined to avoid the

technical problems of interpreting the meaning of the word "trans-shipment" (Jurisdictional Statement, p. 14); it in no way undercuts the consistent assertion of jurisdiction by the Commission or the language of the statute.

3. Appellants' third point is purely a matter of procedure, *viz.*, whether or not the Commission could terminate a proceeding which it has instituted, upon finding that it had served its purpose, and without issuing a cease and desist order; and whether it could properly find that a complainant had not sustained its burden of proof. There is no showing in the appeal specifically identifying how the Commission and the Court have erred.

4. Lastly, there has not even been an attempt by appellants to demonstrate that the Court below erred in holding that a request for an oral hearing, in connection with an application to be processed in the future, is premature and cannot be considered until after exhaustion of administrative remedies. (Court Opinion in No. 47646, p. 10). What is obviously premature for a District Court is even more so for the Supreme Court of the United States.

CONCLUSION

It is respectfully submitted that none of the questions raised by appellants warrant plenary consideration of this Court. The judgment of the Three-Judge District Court should be affirmed.

Respectfully submitted,

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November 6, 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 615

HOUSEHOLD GOODS CARRIERS' BUREAU, ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

On Appeal From the United States District Court for the Northern District of California

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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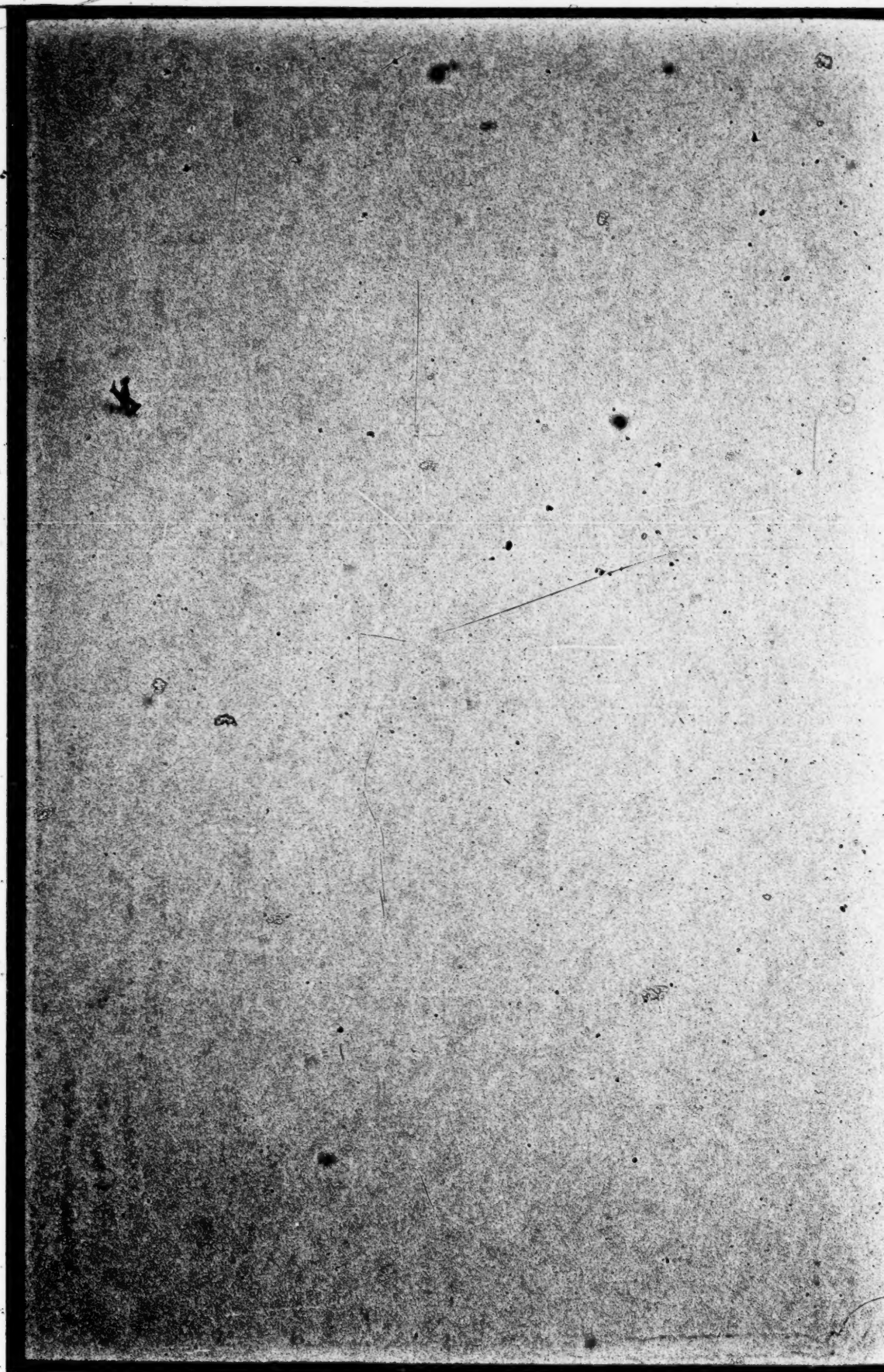

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---

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

As permitted by Rule 16(4) of the Rules of this Court, appellants respectfully submit their brief in reply to the motions to affirm which were filed by United States of America and the Interstate Commerce Commission, hereinafter called the Government, and by the Household Goods Forwarders Association of America, Inc., et al., intervening defendants.

REPLY TO THE GOVERNMENT

The Government urges that two or more forwarders, each with one shipment, can satisfy the statutory test of forwarding by "joint-loading" because the public will otherwise be denied the benefits of the containerized movement of household goods or the transportation thereof will be subjected to unnecessary delays. The Government's position is based on the mistaken concept that the unregulated forwarders were the originators of the containerized method of transporting household goods and perform the great bulk of such transportation. The facts are otherwise.

In *City Transfer & Storage Co. Extension—California,* 17 M.C.C. 7 (1939), decided by the Commission almost three decades ago, the early efforts of motor carriers to make use of the container method of transporting household goods was discussed. The unregulated forwarders have merely adapted an old and well known system to the overseas movements. They have not, however, monopolized the field. The household goods carriers have continued to utilize that method and transport at least a majority of the movements for the Department of Defense. (J.S. 14a-16a)

The basic vice of the Government's argument here and that of the Commission in its *Kingpak* decision is the failure to distinguish between the operations of the unregulated forwarders and the container service offered by the motor carriers of household goods. Under the latter arrangement the household goods carriers tender the loaded containers to the railroads or the general commodity motor carriers for line-haul movement in substitution for line haul by their own facilities. In so doing the household goods carriers retain all the

attributes of common carriers and, moreover, further the goals of the national transportation policy by coordinating their operations with those of other carriers, all as approved and encouraged by this Court in *American Trucking Assos.* v. *A. T. & S. F. R. Co.*, 387 U.S. 397 (1967). Appellants cannot agree, therefore, that the Commission has enunciated "a reasonable basis in law" for its new and startling holding that an entrepreneur who never has enough traffic of his own to consolidate can still qualify as a forwarder under Part IV of the Interstate Commerce Act. Rather, we think the Commission has laid the basis in this case for the virtual destruction of regulation of the transportation of household goods—transportation which the Commission itself found is of great significance in the national transportation picture. (J.S. 13a)

The second argument by the Government is that an agency which "performs" the assembly movement of a shipment to a port and there affects consolidation of it with other shipments, either at the port itself or aboard ship, satisfies the statutory definition of a forwarder. The Government cited *Porter Co.* v. *Central Vermont Ry.*, 366 U.S. 272 (1961), in support.

In the cited case, the only transportation involved was the physical performance of carriage by a railroad. The holding was that the portion of the physical movement which takes place within the United States is subject to regulation. The argument of the Government fails to note that forwarding does not involve physical carriage by the forwarder. It follows, therefore, that only the entire function of forwarding, i.e., forwarding from origin to destination, can be regulated. Laying to one side the exemption feature which somewhat

complicates the situation here, the doctrine espoused by the Government would in the case of forwarders subject to the Act[1] oust the Commission from its jurisdiction to regulate the assembly movement. This is by reason of the provisions of Section 409 of the Interstate Commerce Act [49 U.S.C. § 1009] which was amended to its present form to escape the impact of this Court's decision in *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344 (1940). Section 409 permits contractual arrangements between regulated forwarders and motor carriers for not only the assembly movements but also much of the line haul. The Commission jurisdiction over such contracts is minimal.

The Government urges that the guidelines in the Commission's *Kingpak* decision constitute an adequate discharge of the Commission's obligation because they operate prospectively and therefore would render moot any cease or desist order. Yet in its *Kingpak* decision the Commission itself commented that they are not regulations and compliance with them is not mandatory. (J.S. 28a) Assumedly appellants could in the future bring a complaint before the Commission when in possession of evidence that there has been no compliance with the guidelines and, if the Court below is correct, the Commission could again avoid the necessity for acting on the complaint by issuing new or more detailed guidelines. Surely performance of its regulatory function by the Commission calls for something more than has been done in the *Kingpak* case.

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[1] By its decision in *Routed Thru-Pac, Inc., Freight Forwarder Application*, 332 I.C.C. 352 (1968), the Commission would grant regulated forwarder status to forwarders of household goods.

Finally, the Government avoids confrontation on the Commission's announced adoption of a no-hearing procedure for the local carrier applications by urging that the doctrine is not to be universally applied and that until there has been a direct injury from it, no cause exists for reviewing the Commission's pronouncement. Yet a fair reading of the Commission's own language is that there is to be no hearing when requested by a protestant and that, in any event, the result is foreordained. (J.S. 48a) Moreover, while the Commission found that "an application for operating authority could not ultimately be denied without giving the applicant an opportunity to be heard", it could be granted without giving a protestant an opportunity to be heard. (J.S. 44a) Appellants believe that no such interpretation of the statute can be reasonable.

REPLY TO THE INTERVENING DEFENDANTS

All but one of the arguments advanced by the intervening defendants are fully answered by the foregoing answer to the Government's motion. It is said, however, that appellants have not distinguished the Commission's decisions which assertedly support the *Kingpak* decision. There are two lines of such cases, the first relating to joint loading and the second to operations across an international boundary.

Neither line of cases is apposite here. In no case heretofore has the Commission ever held that two or more aspirants to forwarder status, each with a single shipment, can satisfy the statutory test by joint loading. In no case heretofore has the Commission ever held that mere assembly movement to and across an international boundary is adequate to support a claim to forwarder status.

CONCLUSION

The case is important. It merits plenary review.

Respectfully submitted,

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DATED: November 22, 1968

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

HOUSEHOLD GOODS CARRIERS' BUREAU ET AL.
v. UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 615. Decided December 16, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.